TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PETITIONER,

vs.

FREDERICK S. KEPNER

PETITION FOR CERTIORARI FILED JANUARY 6, 1941.

CERTIORARI GRANTED FEBRUARY 10, 1941.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1]

IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Baltimore, Maryland, Plaintiff,

vs.

FREDERICK S. KEPNER, 405 Lombardy Street, Elmwood Place, Hamilton County, Ohio, Defendant

[No. A-69867]

PETITION—Filed January 25, 1940

(1) Now comes The Baltimore & Ohio Railroad Company, plaintiff herein, and says that it is a corporation duly organized and existing under and by virtue of the laws of the state of Maryland and having its principal office in the city of Baltimore, Maryland; that the defendant, Frederick S. Kepner, is a resident of the village of Elmwood Place located in Hamilton county, Ohio.

(2) Plaintiff further says that the defendant, Frederick S. Kepner, on the eighteenth day of May, 1939, was employed by it as a brakeman, and while on duty in such capacity was on said date involved in an accident as a result of which he received certain personal injuries.

(3) Defendant, at the time of receiving said injuries while employed by this plaintiff was a resident of Hamilton [fol. 2] county, Ohio; and that the place where said injuries were received was East Middletown, Butler county, Ohio, which said county joins Hamilton county at the northerly boundary thereof.

(4) Plaintiff further says that at all times since the occurrence of the accident resulting in the said injuries to the defendant it has operated a part of its railroad system in and through Hamilton and Butler counties, Ohio, and has had numerous agents in its employ in said counties; that in each of the said counties Courts of Common Pleas have been in constant session and the defendant had full and complete opportunity to file any action desired by him for any relief to which he was entitled in the Common Pleas

Court of either of said counties; and that at all times the United States District Court for the Southern District of Ohio, Western Division, has been in constant session and the defendant had full and complete opportunity to file any action desired by him for any relief to which he was entitled in the said United States District Court; that service of process could have been had upon this plaintiff in any of the said courts and service of process was available to enforce the attendance of witnesses to the said incident in all of the said courts.

(5) Plaintiff further says that sometime following the accident hereinbefore referred to defendant employed Morris S. Borden and Samuel T. Gaines, practicing law as partners under the name and style of Borden & Gaines, with offices at 205 National City Bank Building, Cleveland, Ohio, to represent him as counsel in prosecuting his claimed right [fol. 3] of action against this plaintiff; that said attorneys are engaged in the general practice of law in the city of Cleveland, ordinarily engaged in the practice in the United States District Court and the Common Pleas Courts of the state of Ohio.

(6) Plaintiff further says that the defendant has failed to avail himself of the court facilities immediately available within a reasonable distance of the residence of any and all of the witnesses necessary for the trial of any cause of action to which the defendant may be entitled, but that by agreement and conspiracy among defendant and his counsel, has proceeded to file suit based upon the incident hereinbefore referred to which resulted in injuries to the defendant at East Middletown, Ohio, on May 18, 1939, in the United States District Court for the Eastern District of New York in a civil case numbered 763, a copy of which said complaint is attached hereto and made a part hereof to which reference is made for more specific statements with respect to the allegations of the defendant, Frederick S. Kepner.

(7) Plaintiff further says that the situs of the court in which the said action has been filed by the defendant is located more than seven hundred miles from the residence of the said defendant and the residence of the numerous witnesses that will be necessary for the trial of the issues raised in said action; that for the trial of the said case it

will be necessary to transport a distance of more than seven hundred miles approximately twenty-five witnesses consisting of the crew of this plaintiff company who were employed [fol. 4] with the defendant at the time of the said accident together with numerous physicians, surgeons, radiologists, hospital attendants and others who gave him medical attention or who have heretofore examined him, and numerous other railroad employees who inspected the premises following the said accident, inspected the equipment involved, and numerous other non-employee witnesses who will testify as to various essential elements of the accident.

(8) Plaintiff further says that the United States District Court for the Eastern District of New York assigns cases for trial numerically, by terms, and that it is impossible to ascertain a definite time of trial, and that in order to protect its interest and be ready for trial of the said case it will be necessary to provide for all of the numerous witnesses hereinbefore mentioned to be in New York several days prior to the probable date of trial and to be maintained there for all of the said period, in addition to the time necessary for said trial, and that the actual cash cost to this plaintiff of the said cause of action in New York will exceed, by at least four thousand ($4,000) dollars, the cost of the trial of the same issues in a court located near the residence of the defendant.

(9) Plaintiff further says that the trial of the said cause of action in the city of New York deprives this plaintiff of the immediate availability of witnesses; that if it should develop in the course of the said trial that other and additional witnesses are necessary, it will not be possible to arrange for the availability of such witnesses in the city of New York because of the distant location of the said court, [fol. 5] and that, in addition thereto, it will be totally deprived of its right of legal process to force the attendance of witnesses at the said trial, which said right of legal process plaintiff has if said suit were filed either in Butler county or Hamilton county, Ohio, or in the United States District Court for the Southern District of Ohio, Western Division.

(10) This plaintiff further says that the continued prosecution of the said case in the United States District Court for the Eastern District of New York, filed by this defendant, will force this plaintiff to depend upon depositions for the trial of the said case and that it is generally recognized

and the court will take judicial notice of the fact that depositions do not effectively present to the court and jury the facts involved in the issues being tried, and that, as a result thereof, plaintiff will be deprived from presenting the witnesses in person before the court and jury.

(11) Plaintiff further says that the trial of the action in the city of New York will deprive it of the right to present the necessary rebuttal evidence in the trial of the issues involved because of the lack of the right of legal process to force the attendance of witnesses and the impossibility of arranging for their presence in New York within time to be available for rebuttal testimony.

(12) Plaintiff further says that the facts as hereinbefore set forth establish that the continued prosecution by the defendant of his action in the United States District Court for the Eastern District of New York, or in any other distant jurisdiction, will constitute an undue burden on inter-[fol. 6] state commerce, will be unreasonable, improper and inequitable burden upon this plaintiff and that such unreasonable and inequitable proceeding will result in no benefit to the defendant, Frederick S. Kepner.

(13) Plaintiff further believes and therefore alleges that the defendant herein has conspired with his attorneys of Cleveland, Ohio, to bring the said action at a distant point for the purpose of annoying, harassing and vexing the plaintiff herein and without a sound and proper purpose of reasonably prosecuting any right of action that defendant may have against this plaintiff.

Wherefore, plaintiff, The Baltimore & Ohio Railroad Company, prays that the court may fix a date for hearing of an application for a temporary injunction, enjoining and restraining the defendant, Frederick S. Kepner, from further prosecuting the said cause of action against this plaintiff in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court, or in any court of said state, or at any other distant point, against this plaintiff which is or shall be based upon the cause of action hereinbefore referred to, and that, upon final hearing, the said temporary injunction be made permanent, and for such

other and further equitable relief to which this plaintiff may be entitled.

Waite, Schindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Plaintiff.

[Duly verified.]

[fol. 7] United States District Court, Eastern District of New York

No. 763—Fred S. Kepner, Plaintiff, against The Baltimore & Ohio Railroad Company, a Corporation, Defendant.

Complaint

I. Plaintiff says that the defendant is a steam railroad corporation, owning and operating in interstate commerce a railroad in connection with the operation of which the defendant, at the time of the commencement of this action, is doing business in the Eastern District of New York.

II. The trackage of this defendant company extends in and through East Middletown, Ohio. At the time of the happening herein complained of both this plaintiff and this defendant were engaged in interstate commerce, by reason whereof this action arises under and by virtue of the Federal Employers' Liability Act of April 22, 1908 (C-149, Title 45, Sections 51-57, U. S. Code), together with the amendments thereto; that the amount involved herein exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00); wherefore this action is brought in this court.

III. Plaintiff says further that on or about the eighteenth day of May, 1939, and for a long time prior thereto, he was in the employ of this defendant; that on said eighteenth day of May, he was engaged in work in said East Middletown, Ohio, as a brakeman for this defendant company; that while so engaged in pursuit of the duty he owed to this defendant, [fol. 8] he was riding on the top of a box car when suddenly and without any warning he was caused to be struck by a water spout, attached to and forming a part of a water tank owned, operated and maintained by this defendant company, as a direct result of the negligence and carelessness of

the defendant in the construction, maintenance and use of said water tank, spout and appurtenant parts.

IV. Plaintiff says further that at the time of the happening herein complained of he was a man of the age of 49 years, earning and able to earn approximately two hundred fifty dollars ($250.00) per month; that as a direct result of the negligence and carelessness of the defendant, he was caused serious, severe and disabling injuries to his person and body, which injuries are more particularly described as follows, to wit: causing this plaintiff to sustain a compression fracture of the first lumbar vertebra, with serious involvement of the spinal cord, resulting in serious damage to normal bowel and bladder function; causing plaintiff to sustain internal injuries; causing a complete anesthesia in the saddle zone involving the entire genital organ up to the pubic eminence; causing an anesthesia which extends into the perineum, buttocks, anterior pubis and scrotum, with areas of hypesthesia in both lower limbs; causing tenderness and pain over the lumbar region, with serious injury to the muscles, nerves, ligaments, tendons, vessels, cartilage and soft structures in the region of the fractured vertebra which was compressed with encroachment posteriorly on the intraspinal space; causing plaintiff serious injury to his sexual potency; severe shock to his entire nervous system; [fol. 9] causing plaintiff injury to the left index finger; various bruises and contusions about the body generally; that he has been caused some limitation in motion of the entire spine; great pain and suffering which will with reasonable certainty continue in the future and plaintiff believes and therefore avers that his injuries, with reasonable certainty, are permanent in character; plaintiff says that he was confined for approximately 17 weeks in a hospital, practically all of which time he was compelled to lie immobile upon a fracture bed; that the nature of his injuries are such as to require continual nursing care and attention, and plaintiff believes and therefore avers that such continual care and attention will with reasonable certainty be required in the future; plaintiff says farther that as a direct result of the happening herein complained of, he has been unable to pursue his employment in railroad work, and plaintiff believes and therefore avers that his injuries are such as will, with reasonable certainty, permanently incapacitate him in his ability to work and earn monies;

that in the care and treatment of the said injuries, he will caused medical expenses, the exact amount of which plaintiff at this time is unable to state.

Wherefore, plaintiff demands judgment against this defendant in the sum of one hundred twenty-five thousand dollars ($125,000.00), together with the costs of this action.

(Sgd.) Borden & Gaines, by William Samuels, Attorneys for Plaintiff.

[Verification attached.]

[fol. 10] In Court of Common Pleas of Hamilton County

Demurrer—Filed March 8, 1940

Defendant demurs to the petition, for the reason that:

(1) The petition does not state facts which show a cause of action.

(2) That the court has no jurisdiction of the subject of the action.

Respectfully submitted, Edward M. Baillard, George Metzger, Borden & Gaines, Attorneys for Defendant.

In Court of Common Pleas of Hamilton County

Transcript of Docket and Journal Entries

1940, January 24. Petition and pr-ecipe filed and summons issued.

1940, January 25. Entry setting hearing for January 31, 1940, at 10 o'clock a. m. and sheriff of Hamilton county to notify defendant for hearing on application for temporary restraining order.

Upon application of The Baltimore & Ohio Railroad Company, plaintiff, it is ordered that the hearing on the petition for temporary injunction enjoining and restraining the defendant, Frederick S. Kepner, from prosecuting a cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, is hereby set for hearing on the thirty-first day of January, 1940, at 10 o'clock a. m.

[fol. 11] It is further ordered that the sheriff of Hamilton county be and he hereby is commanded to notify the defendant, Frederick S. Kepner, of said date and time for hearing on the application for a temporary restraining order.

1940, January 25. Brief of plaintiff filed.

1940, January 25. Affidavit of Paul C. Garrott filed.

1940, January 25. Affidavit of E. L. Williams filed.

1940, February 5. Summons returned endorsed: Received by Fred Sperber, sheriff, Hamilton county, Ohio, January 25, 1940, at 11:40 a. m.

Cincinnati, Ohio, January 25, 1940.

Served the within named defendant, Frederick S. Kepner, by and through William Brownfield, my duly authorized and acting deputy sheriff, by delivering to him personally a true copy of this writ with all the endorsements thereon. Sheriff fees: $1.71. Fred Sperber, sheriff, Hamilton county, Ohio. By Raymond Kies, deputy.

1940, February 23. Petition to remove to U. S. District Court filed.

1940, February 23. Notice of removal filed.

1940, February 23. Bond of $3,000.00 given for removal.

1940, February 23. Order removing cause to U. S. District Court.

This case coming on to be heard upon the petition and bond of the defendant, Frederick S. Kepner, for an order removing this case to the District Court of the United States for the Southern District of Ohio, Western Division, and it appearing to the court that said defendant, Frederick [fol. 12] S. Kepner, has filed his said petition for said removal of said cause in due form, and that the said petition is sufficient in law; and that said defendant, Frederick S. Kepner, has also filed his bond herein, duly conditioned according to law, with good and sufficient surety thereon; and that said defendant has given due and legal notice to the plaintiff of his intention to file its said petition and bond, and of the time and place of filing the same, and also of this application for an order of removal; and it appearing to the court that this is a proper cause for removal to said District Court of the United States for the Southern District of Ohio, Western Division;

It is therefore, ordered, adjudged and decreed, that the said petition and bond be, and they are, hereby accepted and the said bond is hereby approved by the court; and that this

cause be, and it is, hereby ordered removed to the District Court of the United States for the Southern District of Ohio, Western Division; and that a copy of the record in this cause be prepared and duly certified by the clerk of this court for filing, and that it be filed in said District Court of the United States for the Southern District of Ohio, Western Division, within thirty (30) days from the date of the filing herein of said petition and bond, pursuant to law.

1940, February 23. Leave given to file motion to set aside order removing cause.

1940, February 23. Motion filed.

1940, February 24. Entry Setting Aside Order of Removal.

[fol. 13] This day this cause came on to be heard on the motion of plaintiff, The Baltimore & Ohio Railroad Company, to set aside the order removing this cause to the United States District Court for the Southern District of Ohio, Western Division, and the evidence, the arguments of counsel and was submitted to the court.

Upon consideration whereof and without passing on the merits of defendant's right to remove said cause, the court finds the same to be well taken and hereby grants the same, on the ground that the hearing on the merits of the petition to remove should be heard by Judge Ryan.

Wherefore it is considered, ordered and decreed that the motion of plaintiff to set aside the order removing said cause as aforesaid be and the same hereby is set aside.

To all of which the defendant excepts.

1940, March 5. Application to fix bond filed.

1940, March 6. Entry Denying Petition to Remove.

This day this cause came on to be heard on the petition of defendant, Frederick S. Kepner, praying that the within proceeding be removed to the United States District Court, Southern District of Ohio, Western Division, and the evidence and arguments of counsel and was submitted to the court.

Upon consideration whereof the court finds that this court is not required to surrender its jurisdiction until it has been clearly shown that the petitioner has a right to remove, and has the right to determine whether this cause is removable under the Federal statute. The court further

finds that the defendant is a resident of the state of Ohio [fol. 14] and has failed to establish his right to remove this cause and that this case does not come within the purview of the Federal Employers' Liability Act, and that if it did, then removal could not be had by reason of the provisions of the Federal statutes.

Wherefore, it is considered, ordered and decreed that the prayer of the petition to remove this cause to the United States District Court, Southern District of Ohio, Western Division, be and the same hereby is denied.

To all of which defendant excepts.

1940, March 8. Demurrer filed.

1940, March 8. Motion to dissolve injunction filed.

1940, March 7. Entry Granting Temporary Restraining Order. Order Issued to Sheriff of Hamilton County.

This day this cause came on to be heard on the application of the plaintiff, The Baltimore & Ohio Railroad Company, to grant a temporary injunction enjoining and restraining the defendant, Frederick S. Kepner, from further prosecuting his cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any court of said state or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause, and the evidence and arguments of counsel, and was submitted to the court.

Upon consideration whereof the court finds that in view of the great importance of the subject-matter involved and [fol. 15] the seeming conflict of the authorities on the questions involved, a temporary restraining order should be issued in accordance with the prayer of the petition in order that the matters in controversy be held in status quo until the issues be presented in the pleadings so that this cause be fully heard on its merits.

Wherefore, it is considered, ordered and decreed that the application for temporary restraining order as prayed for in the petition be and the same is hereby granted, and upon the plaintiff giving an undertaking according to law in the sum hereinafter to be fixed by the court, the defendant, Frederick S. Kepner, is temporarily enjoined and re-

strained from further prosecuting his cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any other court of said state or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause praying for said injunction. To all of which the defendant excepts.

1940, March 7. Order Fixing Bond in the Sum of $5,000.00.

This day this cause came on to be heard on the application of plaintiff, The Baltimore & Ohio Railroad Company, to fix the bond to be filed herein on the temporary restraining order heretofore granted, and the evidence and arguments of counsel, and was submitted to the court.

[fol. 16] Upon consideration whereof, the court finds that the plaintiff, The Baltimore & Ohio Railroad Company, should be required to furnish good and sufficient bond in the sum of $5,000.00.

Wherefore, it is considered, ordered and decreed that The Baltimore & Ohio Railroad Company, plaintiff herein, be and it hereby is ordered to furnish good and sufficient bond to the approval of the clerk in the sum of $5,000.00.

1940, March 7. Injunction Bond No. 232 in Book No. 29 in the sum of $5,000.00 given.

1940, March 11. Order of injunction returned endorsed: Received by Fred Sperber, sheriff, Hamilton county, Ohio, March 7, 1940, 12:25 p. m.

Cincinnati, Ohio, March 7, 1940.

Served the within named Frederick S. Kepner by and through William Brownfield, my duly authorized and acting deputy sheriff, by delivering to him personally a true copy of this writ with all the endorsements thereon. Sheriff fees: $1.71. Fred Sperber, sheriff, Hamilton county, Ohio. By Raymond Kies, deputy.

1940, May 14. Entry Sustaining Demurrer and Dismissing Action; Plaintiff to Pay Costs; Plaintiff Excepts.

This cause came on to be heard upon the demurrer filed by the defendant herein, and the court, being fully ad-

vised in the premises, finds that the demurrer is well taken and that the same should be and it is hereby sustained.

It is therefore ordered, adjudged and decreed that the demurrer of the defendant be sustained and the petition [fol. 17] be and it is hereby dismissed, and that the defendant go hence without day and recover from the plaintiff his costs herein. To all of which the plaintiff excepts.

1940, May 14. Entry Dissolving Temporary Restraining Order; Plaintiff Excepts.

This cause came on to be heard upon the motion of the defendant to dissolve the temporary restraining order heretofore entered by this court, and the court, being fully advised in the premises, finds that the motion to dissolve the said temporary restraining order is well taken and that the said motion should be and it is hereby granted.

It is therefore ordered, adjudged and decreed that the motion of the defendant to dissolve the temporary restraining order heretofore entered be sustained, and the said temporary restraining order is hereby dissolved. To all of which the plaintiff excepts.

1940, May 15. Order fixing bond on appeal in the sum of $250.00.

On application of the plaintiff The Baltimore & Ohio Railroad Company to fix the bond herein on the appeal on questions of law and fact the court hereby fixes the bond at two hundred and fifty dollars.

1940, May 15. Leave given to file affidavit of E. L. Williams.

1940, May 15. Affidavit of E. L. Williams filed by leave.

1940, May 15. Notice of Appeal on Questions of Law and Fact Filed.

1940, May 15. Precipe for transcript filed.

[fol. 18] 1940, May 15. Appeal Bond No. 117 on Book No. 28 in the sum of $250.00 given.

1940, May 15. Bill of exceptions filed.

1940, May 15. Waiver of notice and consent to immediate transfer filed.

1940, May 15. Bill of exceptions transmitted to Judge Ryan.

1940, May 15. Bill of exceptions received from Judge Ryan signed and allowed.

[Duly certified.]

[fol. 19] In the Court of Appeals, Hamilton County, Ohio

The Baltimore & Ohio Railroad Company, Plaintiff-Appellant,

vs.

Frederick S. Kepner, Defendant-Appellee

[No. 5843]

Transcript of Docket and Journal Entries

1940, May 16. Transcript and original papers filed.
1940, May 16. Motion for temporary restraining order filed
1940, May 16. Affidavit of William A. Eggers filed.
1940, May 16. Bill of exceptions filed.

1940, May 20. Judgment Entry Finding Appellant Not Entitled to Relief Prayed for in its Petition and Entering Judgment in Favor of Appellee and Certifying Cause to Supreme Court as Being in Conflict, Mandate Sent to Court of Common Pleas.

This cause came on to be heard on an appeal on questions of law and fact from a judgment rendered by the Court of Common Pleas of Hamilton county, Ohio, and was submitted to the court on the evidence, pleadings and arguments of counsel. Upon consideration whereof the court finds from said pleadings and evidence that the plaintiff-[fol. 20] appellant is not entitled to the relief prayed for in its petition.

It is therefore ordered, adjudged and decreed by the court that the petition of the plaintiff-appellant be and the same hereby is dismissed and that the plaintiff-appellant go hence without day and that judgment upon the issues joined be and the same is entered in favor of the defendant-appellee at the costs of the plaintiff-appellant.

The judges of the court find that the judgment herein is in conflict with a judgment pronounced upon the same question by the Court of Appeals of the second appellant district of Ohio in the case of The Baltimore & Ohio Railroad Company v. Orris E. Inlow, No. 3111, of said court, and we do hereby certify the record of this case to the

Supreme Court for review and final determination this twentieth day of May, 1940.

To all of which counsel for plaintiff-appellant excepts.

1940, May 20. Motion for new trial filed.

1940, May 20. Entry Overruling Motion for New Trial.

This cause coming on for hearing on the motion of plaintiff-appellant to set aside the judgment entry heretofore entered herein on the seventeenth day of May, 1940, and for a new trial, upon consideration whereof said motion is overruled to which plaintiff-appellant excepts.

1940, May 20. Bill of exceptions filed.

1940, May 20. Waiver of notice and consent to immediate transmission to court filed.

1940, May 20. Bill of exceptions transmitted to Judges Hamilton, Matthews and Ross.

1940, May 20. Bill of exceptions received from Judges Matthews, Hamilton and Ross signed and allowed.

[Duly certified.]

[fol. 21] In Court of Appeals, Hamilton County, Ohio

Motion for New Trial—Filed May 20, 1940

Now comes plaintiff-appellant, The Baltimore & Ohio Railroad Company, and moves the court to set aside the judgment entry entered herein and to grant plaintiff-appellant a new trial.

Waite, Schindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Plaintiff-Appellant.

[fol. 22] In Court of Appeals, Hamilton County, Ohio

Bill of Exceptions—Filed May 20, 1940

Be it remembered that at the January term of the Court of Appeals of the first appellate district of Ohio, to-wit on the sixteenth day of May, 1940, before Francis M. Hamilton, presiding judge and Judge Stanley Matthews and Judge Simon Rose, this cause came on for hearing, and the following evidence was offered by the parties.

Cincinnati, Ohio, May 17, 1940.

Service of notice is hereby waived and appearance hereby entered and consent to immediate transmission,

reserving all right to question admissibility, relevancy and competency of this bill of exceptions.

Borden & Gaines, Edward M. Ballard, George Metzger, Attorneys for Appellee.

In the Court of Common Pleas, Hamilton County, Ohio

Bill of Exceptions

Be it remembered that upon the trial of this cause at the April, A. D. 1940 term of said Court of Common Pleas, before the Honorable Dennis J. Ryan, one of the judges of said court, the following proceedings were had, to wit:

Cincinnati, Ohio, May 15, 1940.

Service of notice is hereby waived and appearance hereby entered and consent to immediate transmission, reserving [fol. 23] all rights to question the admissibility, relevancy and competency of this bill of exceptions.

Borden & Gaines, Edward M. Ballard, George Metzger.

Affidavit of Paul C. Garrott

Paul C. Garrott of Baltimore, Maryland, being first duly sworn according to law, deposes and says that he is employed by The Baltimore & Ohio Railroad Company in the capacity of general claim agent; that in the said position he is directly engaged in the handling of litigation arising out of personal injury claims against his employer; that in addition thereto he serves in a supervisory capacity over numerous other employees of The Baltimore & Ohio Railroad Company in handling litigation against The Baltimore & Ohio Railroad Company involving personal injuries, and that he has been employed in such capacity and in the claim department of said railroad company for a total of twenty-three years; that during that entire period he has had experience in preparing cases for trial, arranging for the attendance of witnesses and handling all other matters necessary or incident to the trial of cases; that he has on numerous occasions been called upon to arrange for the attendance of witnesses and the presenting of evidence for the trial of cases at points located at a considerable distance

from the place where the accident occurred and from the residences of the witnesses necessary to present the evidence in connection with such cases; that he is familiar from [fol. 24] actual experience with the cost and expense incident to the trial of cases at points distant from the place of residence of the parties to the action and with the difficulties involved in adequately presenting all of the evidence at issue when legal process to require the attendance of witnesses is not available, and that he is familiar with the method of assignment of cases for trial in effect in the United States District Court for the Eastern District of New York.

Affiant further says that cases for trial in said United States District Court for the Eastern District of New York are assigned for trial in numerical order, by terms, and are called for trial in the order assigned, and that it is impossible to determine with any degree of exactness the date of trial of any cases at issue; that it is necessary in order to be prepared for the trial of said cases to arrange for all witnesses to be available in New York for some days prior to the probable date of trial.

This affiant further says that he has studied the claim file covering the case of Frederick S. Kepner against The Baltimore & Ohio Railroad Company and that it appears likely that there will be in excess of twenty-five (25) witnesses necessary to the proper presentation of the defense of said case and that the residences of said witnesses is Butler or Hamilton counties, Ohio, and that because of the great distance involved and the time required in getting from Butler or Hamilton counties, Ohio, to New York, it would be necessary to have all of said witnesses present in New York a number of days before the probable date of trial.

Affiant further says that The Baltimore & Ohio Railroad [fol. 25] Company would be required not only to pay for the travelling expenses in connection with the attendance of said witnesses but for the full period of time such witnesses will be away from their ordinary employment, together with hotel bills and all other expenses incident to the arranging for the attendance of said witnesses at the said trial in New York, and that the actual cost to The Baltimore & Ohio Railroad Company without considering indirect cost, will substantially exceed four thousand ($4000) dollars.

This affiant further says that it is not possible to fully anticipate all of the evidence required to adequately present

the facts to the court and jury when the trial of the litigation is located at a point a great distance from the place of residence of the witnesses either by the taking of depositions or by attempting to anticipate the witnesses required and to arrange for their attendance.

Further affiant saith not.

Paul C. Garrott.

Sworn to before me and subscribed in my presence this twenty-second day of January, 1940. Magdalene Lauer. My commission expires May 5, 1941. (Seal.)

Affidavit of E. L. Williams

E. L. Williams, of Cincinnati, Ohio, being first duly sworn according to law, deposes and says that he is employed by The Baltimore & Ohio Railroad Company in the capacity of general claim agent, that in said position he is directly engaged in handling litigation arising out of personal injury [fol. 26] claims against his employer; that in addition thereto he serves in a supervisory capacity over numerous other employees of The Baltimore & Ohio Railroad Company involving personal injuries; that prior to being appointed general claim agent of The Baltimore & Ohio Railroad Company he was employed by said company as claim agent and has acted as general claim agent or claim agent for a total period of forty (40) years; that during that entire period he has had experience in preparing cases for trial, arranging for the attendance of witnesses and handling of other matters necessary or incident to the trial of cases and that he has on numerous occasions been called upon to arrange for the attendance of witnesses and the presenting of evidence for the trial of cases at points located at a considerable distance from the place where the accident occurred and from the residences of the witnesses necessary to present the evidence in connection with such cases; that he is familiar from actual experience with the cost and expense incident to the trial of cases at points distant from the place of residence of the parties to the action and with the difficulties involved in adequately presenting all of the evidence at issue when legal process to require the attendance of witnesses is not available.

This affiant further says that in his capacity as general claim agent of The Baltimore & Ohio Railroad Company he has been informed that on the eighteenth day of May, 1939, the defendant in the above action, Frederick S. Kepner, was injured at East Middletown, Butler county, Ohio, [fol. 27] while employed by The Baltimore & Ohio Railroad Company as a brakeman; that at the time of the said accident Frederick S. Kepner was a resident of Hamilton county, Ohio; that thereafter the said Frederick S. Kepner has maintained his residence in Hamilton county, Ohio, and now resides at 405 Lombardy street, Elmwood Place, Hamilton county, Ohio; that the defendant, Frederick S. Kepner, has not filed any action against The Baltimore & Ohio Railroad Company in either Butler or Hamilton county or in the United States District Court, Southern District of Ohio, Western Division, but has filed suit based upon the said accident in the United States District Court for the Eastern District of New York.

This affiant further says that since the eighteenth day of May, 1939, The Baltimore & Ohio Railroad Company has at all times operated its system of railroad in and through Butler and Hamilton counties, Ohio, and at other points in the southern district of Ohio, and that at all of said places it has had available numerous agents upon whom service of process could have been had.

This affiant further says that he has made an investigation of the facts involved in the said accident of May 18, 1939 in which the defendant was injured and that all of the witnesses familiar with the facts of said accident, those who have made inspection of the premises and surrounding circumstances since the occurrence, and those who have rendered medical assistance to the said defendant and are aware of his condition, live in Butler county or Hamilton [fol. 28] county, Ohio, and have at all times been subject to legal process to require their attendance as witnesses in the Common Pleas Court of Butler county, Ohio, Hamilton county, Ohio, or in the United States District Court, Southern District of Ohio, Western Division; that during all of said period Morris S. Borden and Samuel T. Gaines who have been employed as counsel by the said Frederick S. Kepner have lived in the county of Cuyahoga, Ohio, and have practiced law in the city of Cleveland, Ohio; that the situs of the court in which this defendant has filed action is located more than seven hundred (700) miles from the

place of the residence of the witnesses and others necessary for the trial of said action.

This affiant further says that he has made an investigation of the witnesses that will be necessary to try the case so filed by the defendant against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York and that the number of witnesses necessary will be in excess of twenty-five (25), consisting of railroad employees on duty with the defendant, the railroad employees who have examined the premises since the said accident and prepared all necessary engineering and other data, those who have inspected the equipment involved, and numerous physicians, surgeons, hospital attendants and other medical experts who are familiar with the medical facts at issue; that it will be necessary to arrange for all of the said witnesses to be present in New York for the trial of said case; that The Baltimore & Ohio Railroad Company will be required not only to pay for all [fol. 29] travelling expenses in connection with the attendance of said witnesses but for the full period of time such persons will be away from their ordinary employment together with hotel bills and all other expenses incident to arranging for the attendance of such witnesses at the said trial in New York; that in the event The Baltimore & Ohio Railroad Company is unable to arrange for the attendance of such witnesses at the said trial in New York it will be necessary to take the depositions of such witnesses; that because of the great distance of the situs of the trial it will be necessary either to take the depositions or to arrange for the attendance of numerous witnesses who may not be necessary in the actual trial of the case because of the inability of those in charge of the said trial to anticipate before trial all of the evidence that may be necessary either as direct or rebuttal testimony, and that the actual cost to The Baltimore & Ohio Railroad Company, without considering indirect cost, of having said trial in New York would greatly exceed the cost of having said trial in Hamilton or Butler counties, Ohio, and will substantially exceed four thousand ($4000) dollars.

This affiant further says that it is not possible to fully anticipate all of the evidence required to adequately present the facts to the court and jury when the trial of the litigation is located at a point a great distance from the places of residence of the witnesses, either by the taking of depo-

sitions or by attempting to anticipate the witnesses re-
[fol. 30] quired and to arrange for the attendance at the trial.

Further affiant saith not.

E. L. Williams.

Sworn to before me and subscribed in my presence this twenty-fourth day of January, 1940. Edw. L. Douglass, Jr., Notary Public in and for Hamilton county, Ohio. (Seal.)

AFFIDAVIT OF E. L. WILLIAMS

E. L. Williams, of Cincinnati, Ohio, being first duly sworn according to law, deposes and says that he is still employed by The Baltimore & Ohio Railroad Company, as originally set out in his affidavit dated January —, 1940. He further says that since the aforesaid affidavit was made, an additional investigation has been conducted under his supervision and that new facts have been developed which will be material to the defense of the case and that in order to prove the new facts from six to eight witnesses residing in Hamilton county will be necessary. None of said witnesses are employed by The Baltimore & Ohio Railroad Company and none of them would be subject to the process of the United States District Court, Eastern District of New York; that the testimony of said witnesses can not be taken by deposition as it would only be used in the event of possible developments during the trial of the case and to take their depositions would disclose the nature of the defense. He further says that none of said witnesses were included in the original affidavit and all of them in addition thereto.
[fol. 31] Affiant further says that approximately twenty of the original witnesses will have to travel a distance of over eight hundred and five miles, and the rest of the witnesses, including those mentioned in the within affidavit will have to travel over seven hundred and seventy miles to the point of trial.

Further affiant saith not.

E. L. Williams.

Sworn to before me and subscribed in my presence this fourteenth day of March, 1940. Edwin L. Douglass, Jr., Notary Public in and for Hamilton County, Ohio. (Seal.)

Thereupon the court rendered judgment as appears of record in this cause.

Order Overruling Motion for New Trial

Thereupon, afterwards, and within three days, the plaintiff, by its counsel, filed in writing its motion to set aside said verdict and for a new trial, which motion the court overruled, to which action of the court, plaintiff, by its counsel, then and there duly excepted.

Order Settling Bill of Exceptions

And now comes the plaintiff, by its counsel, and tenders this, its bill of exceptions, containing all the evidence introduced on the trial of this cause, the same having been filed with the clerk of the court the fifteenth day of May, A. D. 1940, and being within forty days of the overruling of the motion for a new trial, and prays that the same be allowed, settled, signed, and ordered to be made a part of the record herein, which is accordingly done.

[fol. 32] Witness the hand of this court this fifteenth day of May, A. D. 1940.

Dennis J. Ryan, Judge, Court of Common Pleas, Hamilton County, Ohio.

Affidavit of Wm. A. Eggels

State of Ohio,
Hamilton County, ss:

William A. Eggers, being first duly cautioned and sworn, deposes and says that he is assistant general solicitor of The Baltimore & Ohio Railroad Company and is familiar with the above case and the proceedings had in the Court of Common Pleas in said cause. Deponent further says that he is informed and believes that the next call of the docket in the United States District Court for the Eastern District of New York will be on or about May 25, 1940, and that defendant, Frederick S. Kepner, will at that time personally or through his counsel have the case set for trial and that the date for hearing of said trial will in all probability be early in June. Deponent further says that proceeding with said trial in said cause in said eastern district of New

York would cause great and irreparable injury to plaintiff in the event that the Court of Appeals, First Appellate District of Ohio should reverse the judgment of the Court of Common Pleas of Hamilton county and hold that the appellant herein is entitled to an injunction.

Further deponent saith not.

William A. Eggers.

Sworn to before me and subscribed in my presence this fifteenth day of May, 1940. Ralph M. Buzek, Notary Public in and for Hamilton County, Ohio. (Seal.)

[fol. 33] The above and foregoing was all the evidence offered by the parties or either of them upon the trial of this cause.

Upon consideration whereof, the court found the equities to be in favor of the appellee, Frederick S. Kepner, as appears of record herein.

Order Overruling Motion for New Trial

Whereupon and afterward and within three days appellant, The Baltimore & Ohio Railroad Company, filed a motion for a new trial, which, after consideration, the court overruled.

Order Settling Bill of Exceptions

And now comes appellant, The Baltimore & Ohio Railroad Company and tenders this its bill of exceptions, the same having been filed with the clerk of courts within one day after the overruling of the motion for a new trial, and prays that the same be allowed, signed and made part of the record herein, which is accordingly done.

Witness, the hand of the court on this twentieth day of May, A. D. 1940.

Francis M. Hamilton, Judge; Stanley Matthews, Judge; Simon Ross, Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 34] Opinion of the Supreme Court of Ohio

The Baltimore & Ohio Rd. Co., Appellant,

v.

Kepner, Appellee

Injunction—State Courts Cannot Enjoin Bringing Action in Federal Court in Another State—Federal Employers' Liability Act

The state courts of this state cannot, in the exercise of their equity powers, enjoin a resident of the state from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a federal court of another state having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this state, and even though its prosecution in the federal court of another state may cause great inconvenience and expense to the defendant.

No. 28205. Decided December 18, 1940

Certified by the Court of Appeals of Hamilton County

On rehearing.

On May 18, 1939, Frederick S. Kepner sustained personal injuries at East Middletown, Butler county, Ohio, while engaged in the performance of his duties as a brakeman in interstate commerce for The Baltimore & Ohio Railroad Company. Kepner is now, and was at the time of his injury, a resident of Hamilton county, Ohio. To recover damages for such injury, he instituted an action against the railroad [fol. 35] company under the Federal Employers' Liability Act in the United States District Court for the Eastern District of New York, in which district the railroad company was doing business at the time such action was commenced.

After Kepner's suit had been instituted, plaintiff in this action, The Baltimore & Ohio Railroad Company, brought this suit against Kepner, as defendant, in the Common Pleas Court of Hamilton county, to enjoin him from further prosecuting his personal injury suit in the federal court for the Eastern District of New York. The plaintiff in its petition, in addition to stating the above facts, alleges that it has at all times, since the accident to the defendant, operated a part of its railroad system through Hamilton and

Butler counties in the state of Ohio where the Common Pleas Court's of these counties and the United States District Court for the Southern District of Ohio, Western Division, have jurisdiction to hear and decide defendant's alleged cause of action; that Kepner in bringing his action against the railroad company, more than 700 miles distant from his residence and place of his accident, will cause great inconvenience and unwarranted expense to the plaintiff in that it will be obliged to transport not less than 25 witnesses from the vicinity of Kepner's accident to the place of trial and to keep these witnesses there before and during the trial for several days at an increased expense of not less than $4,000; and that the prosecution of that action in the New York federal court will constitute an undue burden on interstate commerce, and will be an unreasonable, improper and inequitable burden on the company, with no benefit to Kepner.

The defendant demurred to the petition on the grounds that it did not state facts showing a cause of action and that the court had no jurisdiction of the subject of action, which demurrer was sustained. The plaintiff electing not to plead further, the court entered judgment for the defendant and [fol. 36] dismissed the petition. Thereupon, plaintiff appealed to the Court of Appeals of Hamilton county on questions of law and fact, which court entered a decree for the defendant but certified its record to this court for review and final determination on the ground that its judgment in this case is in conflict with that of the Court of Appeals of Franklin county in the case of Baltimore & Ohio Rd. Co. v. Inlow, unreported.

Messrs. Waite, Schindel & Bayless, Mr. Herbert Shaffer and Mr. Philip J. Schneider, for appellant.

Messrs. Borden & Gaines, Mr. Edward M. Ballard and Mr. George Metzger, for appellee.

Hart, J.:

The question presented in this case is: May a state court of equity restrain a railroad company's employee, injured in the course of his employment in the state of his residence while engaged in interstate commerce, from prosecuting a cause of action for such injury against his employer under the Federal Employers' Liability Act in a federal District Court of a foreign state, in which district the railroad com-

pany was doing business at the time the action was commenced, on the ground that such action thus instituted would cause the railroad company unnecessary inconvenience and expense in the trial of such action?

The defendant's demurrer admits all well-pleaded facts including allegations to the effect that defendant's prosecution of his action against the railroad company in the District Court of New York, more than 700 miles from his residence and the place of his accident, will inconvenience and harass the railroad company, and will subject it to unnecessary expense. We may, therefore, assume that the equities shown by the petition favor the contention of the plaintiff, and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action. Defendant [fol. 37] Kepner predicates his demurrer to the petition on the provisions of Title 45, Section 56, U. S. Code, which is in part as follows:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

The plaintiff claims that notwithstanding the right of an employee under the statute to prosecute his claim for damages in a district in which the employer is doing business at the time of commencing such action, the state courts of the state of the employee's residence have jurisdiction over him to control him in person and prevent him from invoking the jurisdiction of such district court in a foreign state, if it is inequitable to the employer for him to do so. The plaintiff, to sustain its position, relies in large measure on the recent decision of this court in the case of New York, Chicago & St. Louis Rd. Co. v. Matzinger, 136 Ohio St., 271, 25 N. E. (2d), 349, wherein this court affirmed a judgment of the Court of Appeals holding that the plaintiff below could be enjoined from prosecuting in the state of Illinois her claim for damages for personal injuries suffered in an accident at the hands of the railroad company in this state, where to prosecute such an action would be unduly harassing or oppressive to the defendant. The jurisdiction of the court of this state to make such an order under proper circumstances was approved on the ground

that the person on whom the restraining order is made resides within the jurisdiction and is within the power of the court issuing it. In that case this court said: "The jurisdiction rests in the authority vested in courts of equity over persons * * * not in contravention of any right given by the Constitution or laws of the United States."

This court further pointed out that the question involved in the Matzinger case, above referred to, was one of venue [fol. 38] rather than jurisdiction; that jurisdiction connotes the power to hear and decide a case on the merits while venue connotes locality, the place where a suit should be heard; and that both jurisdiction and venue are prescribed by constitutional or statutory provisions. This court still fully adheres to the doctrine announced in that case when applied to a similar state of facts. However, this court is of opinion that the doctrine of the Matzinger case does not apply to the case at bar.

In the Matzinger case, the plaintiff had no specially granted or inherent right to invoke the jurisdiction of the Illinois court except as she, herself, chose to go into the court of that state and on her own motion invoke its jurisdiction by filing her petition therein. There was no law in Ohio, the jurisdiction of her residence, which granted her that right. If there could have been and had been such a law, valid within the state of Ohio, it would seem apparent that no Ohio court could take that right away by injunction operating upon her person.

While in Ohio, certain actions may be brought only in the county in which the defendant resides or may be summoned (Section 11277, General Code), yet under Section 6308, General Code, actions for injury to person or property caused by the negligence of the owner or operator of a motor vehicle may be brought by the person injured against such owner or operator in the county wherein such injuries occur, even though either the plaintiff or defendant, or both, may reside in *in* the most distant part of the state from the place of accident, and even though the prosecution of such action in the county where the injury occurred will result in great inconvenience and added expense to the defendant. This right to prosecute an action in the county where injuries occurred is one specially granted by statute. This court has held that the adoption of a similar statute, giving the party injured in an automobile accident the right [fol. 39] to bring his action in the county in which he re-

sides, was not only a constitutional exercise of legislative power (Allen v. Smith, 84 Ohio St., 283, 93 N. E. 829, Ann. Cas. 1912C, 611) but that such statute, being remedial in character, must be liberally construed. Gorey v. Black, 109 Ohio St., 73, 79, 125 N. E., 126. In the former case above cited, Judge Spear, speaking for the court (page 290), said:

"Whether or not this power is always wisely exercise; whether it always brings perfectly fair results, and whether such legislation is entirely reasonable, it is not important for us to inquire; once the power to legislate on the subject and determine the venue of actions is found to exist in the General Assembly, the wisdom of its exercise is not a judicial question."

The federal statute now under consideration specifically grants to defendant Kepner a right to bring an action to recover for his injuries, as he did do, in the federal District Court where the plaintiff in this action is doing business. This statute being federal and nationwide in its application, operates in the place of his residence. It is not necessary for him to go into a foreign state, so far as jurisdiction is concerned, to invoke its operation in his case. It becomes a substantial part of his right of action.

This right did not come by accident but by design, so far as the Congress of the United States is concerned. The history of the Federal Employers' Liability Act shows that it has been the intent of Congress to enlarge, from time to time, the rights and privileges of the employee under this act. When first enacted in 1906 (34 Stats. at L., 232), the act did not contain any designation of the courts in which actions under it might be brought and did not attempt to establish any venue. The original act was declared unconstitutional (Employers' Liability Cases, 207 U. S., 463, 52 L. Ed., 297, 28 S. Ct. 141), but a similar act was again passed in 1908 (35 Stats. at L., 65). While both the original [fol. 40] and the newer act provided that an employee should not be barred recovery because of his contributory negligence, but that damages should be diminished in proportion to the amount of his contributory negligence, the latter act provided that the employee injured or killed by accident and guilty of contributory negligence should not be held to be negligent, and did not assume the risk where the common carrier had violated the Safety Appliance Act. The statute of limitations was extended from one year to two years.

Under the latter act, no provision was made as to jurisdiction or venue and the employee was obliged to bring his action in the state courts unless there was diversity of citizenship or some other fact which gave the federal courts jurisdiction under the Federal Code. Cases instituted in the state courts were then removable to the federal courts on the grounds provided in the Federal Code.

However, when the statute was amended in 1910 (36 Stats. at L. 291) the act was still further liberalized in favor of the employee. For the first time the venue of actions under the act was specifically provided to the effect that an action "may be brought in the Circuit Courts of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." The jurisdiction of the courts of the United States under this amendment was made concurrent with that of the several states, and no case arising under the amended act brought in a state court could be removed to any court of the United States. In 1911, when the Circuit Courts were abolished, their jurisdiction was transferred to the District Courts of the United States. By an amendment of the act in 1939 (53 Stats. at L., —), a three-year limitation was provided.

It is obvious that when Congress amended the act in 1910 [fol. 41] and thereby provided that an employee plaintiff might bring his action in the district of the residence of a defendant, or in which the cause of action arose, or in which a defendant was doing business at the time of commencing such action, it gave him, and intended to give him, his free choice to bring his action in any one of the three possible locations mentioned in the statute, and gave him this right with full knowledge that it would permit him, under the permissive circumstances named in the statute, to bring his action in courts far distant from the place where his cause of action arose. Under these circumstances, should a state court interfere with the exercise of a right thus granted to the injured employee? The majority of this court thinks not.

By the weight of authority, a state court may enjoin one of its residents from prosecuting a case arising under the Federal Employers' Liability Act, in a state court of another state, but may not enjoin such resident from prosecuting an action under the Federal Employers' Liability Act in the federal courts of another state, assuming that

such federal court has jurisdiction under the act. The basis for this distinction lies in the fact that in the one case the court is enjoining a privilege which an employee cannot demand; while in the other, the court is attempting to enjoin the exercise of a right which an employee is privileged, under the Federal Employers' Liability Act, to enjoy.

To illustrate, Congress may give permissive jurisdiction to the state courts to hear and decide cases arising under a federal act, but cannot compel a state court to accept such jurisdiction. That a state has the power to limit the exercise of such jurisdiction by its courts is demonstrated by the legislative enactment and judicial interpretation of Section 11273, General Code, which excludes from the jurisdiction of the state courts of Ohio all causes, including causes of action arising under the Federal Employers' Liability [fol. 42] Act against railroad companies for injuries occurring without the state of Ohio, unless the claimant is a resident of this state or unless the injury complained of resulted from the joint negligence of such railroad company and another defendant properly joined as defendants in an action properly brought against the latter defendant in a county of this state in which venue is authorized by such statute. Loftus v. Pennsylvania Rd. Co., 107 Ohio St., 352, 140 N. E., 94; Baltimore & Ohio Rd. Co. v. Baillie, 112 Ohio St., 567, 148 N. E., 233; Reeves v. Louisville & Nashville Rd. Co., 124 Ohio St., 657, 181 N. E., 885 (appeal dismissed by United States Supreme Court for want of a substantial federal question, Reeves v. Louisville & Nashville Rd. Co., 285 U. S., 524, 76 L. Ed., 922, 52 S. Ct., 314). By the same token, Congress cannot give a resident of Ohio an absolute right to prosecute in a state court of New York a cause of action arising in Ohio under a federal act; nor can the state court of New York be required to accept jurisdiction of a suit to enforce such cause of action. Robertson v. Baldwin, 165 U. S., 275, 41 L. Ed., 715, 17 S. Ct., 326; Douglas v. New York, New Haven & Hartford Rd. Co., 279 U. S., 377, 387, 73 L. Ed., 747, 49 S. Ct., 355; Chambers v. Baltimore & Ohio Rd. Co., 207 U. S., 142, 52 L. Ed., 143, 28 S. Ct., 34; Ex parte Crandall, 52 F. (2d), 650, 654; Walton v. Pryor, 276 Ill., 563, 115 N. E., 2, L. R. A. 1918E, 1914.

When, therefore, an Ohio court enjoins a resident of the state from prosecuting his suit in the courts of another state, it is not restraining such citizen from the exercise of a right specially granted or interfering with the exercise

of any duty or obligation on the part of such foreign state court to take jurisdiction of an action arising outside of that state. When an Ohio court thus enjoins a resident of the state, it does not deprive him of a legal right which is effective in Ohio and assertable by him as a resident of Ohio. On the other hand, Congress has, under the Federal Em-[fol. 43] ployers' Liability Act, conferred upon all citizens of the United States, including those of Ohio, the specific right to prosecute a cause of action under such act in a District Court of the United States in a district in which the employer may be doing business at the time of commencing such action, and has imposed upon such District Courts the duty of exercising such jurisdiction, when invoked. If, therefore, a court of the state of Ohio, as in this case, should enjoin an employee from prosecuting his action arising in Ohio under the Federal Employers' Liability Act, in the District Court of New York, within which an employer, corresponding to the plaintiff in this case, is doing business, the result would be to destroy a federal right of the employee and to obstruct the performance of a duty imposed by act of Congress upon the federal court of New York. The law does not warrant such interference.

The distinction here pointed out is well illustrated by the holdings of the Supreme Court of Indiana. In the case of Kern v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 204 Ind., 595, 185 N. E., 446, decided in 1933, the court held that a resident of Indiana was properly enjoined from bringing an action against a railway company under the Federal Employers' Liability Act in a state court of Missouri when such action arose in Indiana, and when the trial in Missouri would be burdensome and expensive to the defendant and an interference with interstate commerce. Other authorities supporting this rule are: State, ex rel. New York, Chicago & St. Louis Rd. Co., v. Nortoni, Judge, 331 Mo., 764, 55 S. W. (2d), 272, 85 A. L. R., 1345, and annotation; Reed's Admx. v. Illinois Central Rd. Co., 182 Ky., 455, 206 S. W., 794; Chicago, Milwaukee & St. Paul Ry. Co. v. McGinley, 175 Wis., 565, 185 N. W., 218.

But in the case of McConnell v. Thomson, 213 Ind., 16, 8 N. E. (2d) 986, decided in 1937, the Supreme Court of Indiana held that a state court cannot limit a United States [fol. 44] citizen's exercise of a right conferred by a valid act of Congress, since the state itself, in the exercise of full sovereign power, cannot limit or abridge such right; and

that an Indiana court of equity, therefore, had no power to enjoin an Indiana resident from prosecuting an action in a federal court of the state of Missouri under the Federal Employers' Liability Act, since such injunction would destroy the federal right of a litigant and obstruct the federal court in the performance of its duty.

The doctrine of the last above-mentioned case seems to be supported by the overwhelming weight of authority to the effect that the jurisdiction of the federal courts to determine causes arising under the Federal Employers' Liability Act cannot be enjoined or interferred with by a state, or by state or other courts. 28 American Jurisprudence, 400, Section 217; Hoffman, Judge, v. Missouri, ex rel. Foraker, 274 U. S., 21, 71 L. Ed., 905, 47 S. Ct., 485; Connelly v. Central Rd. Co. of New Jersey, 238 F., 932, 933; Trapp v. Baltimore & Ohio Rd. Co., 283 F., 655; Chicago, M. & St. Paul Ry. Co. v. Schendel, 292 F., 326, 329; Norris v. Illinois Rd. Co., 18 F. (2d), 584; Southern Rx. Co. v. Cochran, Judge (C. C. A. 6), 56 F. (2d), 1019; Wood v. Delaware & Hudson Rd. Co., 63 F. (2d), 235; Chesapeake & Ohio Ry. Co. v. Vigor (C. C. A. 6), 90 F. (2d), 7.

In the last case above cited, a suit originating in the District Court of the United States for the Southern District of Ohio, the court denied the railroad company an injunction to enjoin the administratrix of an employee of the railroad company who resided at Columbus, Ohio, and who was killed at Marion, Ohio, from prosecuting her action under the Federal Employers' Liability Act in the United States District Court for the Northern District of Indiana at Hammond, Indiana, on the claimed ground that the prosecution of the suit in Indiana would give the plaintiff in that suit an unfair advantage and would cause the railroad com- [fol. 45] pany unreasonable hardship. The Circuit Court of Appeals for the Sixth Circuit, in affirming the judgment of the District Court, said:

"Plaintiff was doing business in the Northern District of Indiana at the time the action in that court was filed, and there is no doubt of the right of the defendant under the statute to file her suit in that jurisdiction. * * * The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in plac-

ing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held in Southern Railway Company v. Cochran, 56 F. (2d), 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority, and it is controlling in the case at bar." The United States Supreme Court denied certiorari in that case on October 11, 1937 (C. & O. Ry. Co. v. Vigor, 302 U. S., 705, 82 L. Ed., 545).

The plaintiff in this case places great reliance upon the case of Bryant v. Atlantic Coast Line Rd. Co., 92 F. (2d), 569, as supporting its contention, but this court does not view it as a controlling authority. In that case, the plaintiff, a resident of Virginia, employed by the defendant engaged in interstate commerce was injured in his employment in Virginia. He sued the defendant railroad company in the United States District Court for the Southern District of New York under the Federal Employers' Liability Act. The defendant appeared specially and moved to dismiss the action on the ground that it was a burden upon interstate commerce to require defendant to try the cause in New York instead of Virginia, where plaintiff lived, the accident [fol. 46] happened and the witnesses were available. The motion was denied and the defendant answered. Thereafter, the defendant railroad company filed a suit in equity in a state court of Virginia to enjoin the plaintiff from prosecuting his action in New York on the ground that it was oppressive and that the proper forum was in Virginia. The Virginia court enjoined the plaintiff from proceeding in the New York federal court. Thereupon, the plaintiff moved in the District Court in New York for an order enjoining the defendant from taking any steps to enforce the Virginia state court injunction or to prosecute the suit. The motion was denied and plaintiff appealed.

The Circuit Court of Appeals did not put any stamp of approval upon the right of the state court of Virginia to enjoin the plaintiff from prosecuting his action in the federal court, but held that the District Court was right in not issuing a counter injunction against the defendant in prosecuting its injunction suit in Virginia; that federal courts will enjoin state courts where a suit has been first begun in

a federal court and it has assumed custody of a res, as in case of property in a bankruptcy estate, or other property in control of the federal court; and that a federal court may enjoin under circumstances where, unless the state suit is enjoined, the plaintiff in the federal suit will permanently lose a defense which cannot be set up in the state suit. Otherwise, federal courts will not interfere with the jurisdiction of state courts. The court then significantly suggested that the plaintiff in the federal suit, defendant in the Virginia suit, might seek relief in the latter case "by appeal to the Supreme Court of Virginia and by *certiorari* to the Supreme Court of the United States." The court finally suggests that plaintiff's motion for injunction to prevent the defendant from enforcing the Virginia decree "strove to supersede that suit by drawing the same issue before the federal court." The court says: "Both controversies were [fol. 47] suits *in personam* which did not concern a *res* susceptible of custody. Both may therefore go along side by side."

It is interesting to note that the opinion in the last above-mentioned case was written by Judge Learned Hand, who joined with the other members of the same court in the decision by that court of the case of Wood v. Delaware & Hudson Rd. Co., supra.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Day, Zimmerman, Turner, Williams and Matthias, concur.

Weygandt, C. J., dissents.

[fol. 48] Supreme Court of the State of Ohio of the Term of January, A. D. 1941

State of Ohio,
City of Columbus:

I, H. L. Connett, Assistant Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing printed transcript consisting of fourteen (14) pages, constitutes a full, true and correct copy of the opinion of the Supreme Court of Ohio in the case of The Baltimore & Ohio Rd. Co., Appellant, v. Kepner, Appellee, as the same appears on file and of record in this office, as of the date of this certificate.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this second day of January, A. D., 1941.

H. L. Connett, Assistant Reporter. (Seal.)

[fol. 49] Transcript of Docket and Journal Entries in the Supreme Court of the State of Ohio

No. 28205

Title: The Baltimore and Ohio Railroad Company, Plaintiff and appellant, vs. Frederick S. Kepner, Defendant and appellee.

Action: Record certified for review and final determination by the Court of Appeals of Hamilton County.

Counsel: For appellant, Waite, Schindel & Bayless, Herbert Shaffer, Philip J. Schneider, Union Central Life Building, Cincinnati, Ohio. For appellee, George Metzger, 715 Gwynne Building, Cincinnati, Ohio; Borden & Gaines, National City Bank Building, Cleveland; Edward M. Ballard, 715 Gwynne Building, Cincinnati; Paul R. Brown, 139 N. Clark St., Chicago, Illinois.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

May 21, 1940. Court of Appeals Transcript, Original Papers and Bill of Exceptions filed.

May 21, 1940. Cause docketed on certificate of conflict.

May 22, 1940. Papers taken by Rodenfels.

May 23, 1940. Appellants printed brief filed. 5/24/40 P. S. filed.

May 23, 1940. Printed record (12) filed. 5/24/40 P. S. filed.

May 23, 1940. Motion by appellant for a temporary restraining order and proof of service filed, and affidavits of William A. Eggers and Philip J. Schneider filed.

May 24, 1940. Affidavit of Samuel T. Gaines (1) filed.

May 24, 1940. Entry granting temporary restraining order; bond fixed at $5,000. Carl V. Weygandt, C. J. Journal 36, page 34.

May 24, 1940. Bond in sum of $5,000 B. & O. Railroad as principal, and U. S. F. & G. as surety, approved and filed.

May 28, 1940. Entry granting temporary restraining order served on defendant by Sheriff of Hamilton County, Return as follows: "Served the within named defendant, Frederick S. Kepner, by and through Wm. Brownfield, my duly authorized and acting Deputy Sheriff, by delivering to him personally a true and correct copy of this writ, with all the endorsements thereon, at 7 P. M. 5/25/40. Fred Sperber, Sheriff, by Raymond Kies, Deputy." Sheriff's fees $3.63.

May 31, 1940. Appellee's printed brief filed. 6/3/40 P. S. filed.

June 5, 1940. Reply brief of appellant filed. 6/7/40 P. S. filed.

June 18, 1940. Printer's receipted bill filed.

[fol. 50] July 10, 1940. Judgment affirmed. Journal 36, page 81.

July 16, 1940. Application for rehearing filed.

July 17, 1940. Brief in opposition to application for rehearing filed.

July 19, 1940. Memorandum of appellant on rehearing filed.

Oct. 2, 1940. Rehearing allowed. Journal 36, page 122.

Oct. 25, 1940. Printed revised reply brief of appellant filed.

November 12, 1940. Appellee's printed supplemental brief filed. 11/19/40 P. S. Filed.

Nov. 15, 1940. Appellant's printed reply brief filed. 11/18/40 Proof of service filed.

Dec. 18, 1940. Judgment affirmed. Journal 36, page 180.

Dec. 20, 1940. Entry granting temporary stay and injunction on condition that appellant file his petition for writ of certiorari within 20 days and upon giving bond in the sum of $5,000 to approval of Clerk of this Court. Carl V. Weygandt, C. J. Journal 36, page 182.

Dec. 20, 1940. Application of appellant for stay and injunction filed.

Dec. 20, 1940. Bond in sum of $5,000 U. S. Fidelity & Guaranty Co., surety approved and filed.

Dec. 24, 1940. Proof of service of order granting temporary restraining order filed. Sheriff's fees, Cuyahoga County, $2.99.

Dec. 24, 1940. Application for rehearing filed. 12/26/40 P. S. filed.

Dec. 31, 1940. Rehearing denied. Journal 36, page 194.

Journal Entries

Friday, May 24, 1940. Entry Granting Temporary Restraining Order. This day this cause came on to be heard on the application of the plaintiff, The Baltimore & Ohio Railroad Company, to grant a temporary injunction enjoining and restraining the defendant, Frederick S. Kepner, from further prosecuting his cause of action against the Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any court of said state or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause, and the evidence and arguments of counsel, and was submitted to the Court. Upon consideration whereof the court finds that in view of the great importance of the subject matter involved and the seeming conflict of the authorities on the questions involved, a temporary restraining order should be issued in accordance with the prayer of the petition in order that the matters in controversy be held in status quo until the issues be presented in the pleadings so that this cause be fully heard on its merits. Wherefore, it is considered, ordered and decreed that the application for temporary restraining order as prayed for in the petition be and the same is hereby [fol. 51] granted, and upon the plaintiff giving an undertaking according to law in the sum hereinafter to be fixed by the Court, the defendant, Frederick S. Kepner, is temporarily enjoined and restrained from further prosecuting his cause of action against The Baltimore & Ohio Railroad Company in the United States District Court for the Eastern District of New York, and from commencing and prosecuting any other action in said court or in any court of said State or at any other distant point against said The Baltimore & Ohio Railroad Company which is or shall be based upon the cause of action referred to in the petition in this cause praying for said injunction. It is further considered, ordered and decreed that The Baltimore & Ohio Railroad Company, plaintiff herein, be and it hereby is ordered to furnish good and sufficient bond to the approval of the Clerk in the sum of $5000.00. To all of which defendant excepts. Carl V. Weygand, Chief Justice of the Supreme Court. Journal 36, page 34.

Wednesday, July 10, 1940. Record certified for review and final determination by the Court of Appeals of Hamilton County. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it appearing that the judges of the Court are equally divided in opinion as to the merits of this case (the Court now being constituted of six judges) and are for that reason unable to agree upon a judgment and the entry of that fact constituting an affirmance of the judgment of the Court of Appeals, it is ordered that said judgment be affirmed. It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $—. Ordered, That a special mandate be sent to the Court of Appeals of Hamilton County, to carry this judgment into execution. Journal 36, page 81.

Wednesday, October 2, 1940. Rehearing docket. Upon consideration of the application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, allowed. Journal 36, page 122.

Wednesday, December 18, 1940. Record Certified for Review and Final determination by the Court of Appeals of Hamilton County. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and the temporary restraining order be dissolved; and it appearing to the Court that there were reasonable grounds for this proceeding it is ordered that no penalty be assessed herein. It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $—. Ordered, That a special mandate be sent to the court of Appeals of Hamilton County, to carry this judgment into execution. Journal 36, page 180.

Friday, December 20, 1940. Entry granting temporary stay and injunction. This day this cause came on to be heard on the motion of the plaintiff-appellant, The Baltimore and Ohio Railroad Company, to grant a temporary stay and injunction enjoining and restraining the defendant-appellee, Frederick S. Kepner, from further prosecuting his cause of action against The Baltimore and Ohio Railroad Company in the United States District Court for

the Eastern District of New York until the petition of The Baltimore and Ohio Railroad Company for a writ of certiorari to this court may be determined, and the evidence and argument of counsel, and was submitted to the Court. Upon consideration whereof the Court finds that The Baltimore and Ohio Railroad Company proposes forthwith to file its petition for a writ of certiorari with the Supreme Court of the United States, and that the defendant-appellee has caused his suit to be on the trial docket for trial and threatens to proceed forthwith in the trial of this suit now pending in the United States District Court for the Eastern District of New York, and that it would be contrary to the best interests of justice and equity if the trial of said cause in the Federal Court is heard prior to the determination by the Supreme Court of the United States of the proposed petition for a writ of certiorari, and that further proceedings herein should be stayed, and the effective date of the finding of this Court postponed, and that the defendant-appellee, Frederick S. Kepner, be enjoined from proceeding with said suit in the United States District Court for [fol. 52] the Eastern District of New York, on condition that said The Baltimore and Ohio Railroad Company file it's petition for a writ of certiorari within 20 days hereof, and that the matter be pursued in the Supreme Court of the United States in accordance with the rules of said Court, and that the stay herein granted await the outcome of said proceedings, And provided further, that The Baltimore and Ohio Railroad Company furnish good and sufficient bond, to the approval of the Clerk of this Court, in the sum of Five Thousand Dollars ($5000.00), conditioned upon the filing of a petition for writ of certiorari on the terms and conditions set forth above. Carl V. Weygandt, Chief Justice of the Supreme Court. Journal 36, page 182.

Tuesday, December 31, 1940. Rehearing docket. Upon consideration of the application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied. Journal 36, page 194.

State of Ohio,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing trans-

cript of docket and journal entries of the Supreme Court of Ohio is truly taken and correctly copied *copied* from the records of the said Supreme Court of Ohio in the within entitled cause.

Witness my hand and the seal of the Supreme Court of Ohio, affixed at Columbus, this 2nd day of January, A. D. 1941.

Seba H. Miller, Clerk of the Supreme Court of Ohio.
(Seal.)

[fol. 53] Supreme Court of the United States

Order Allowing Certiorari—Filed February 10, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,927. Ohio Supreme Court. Term No. 678. The Baltimore and Ohio Railroad Company, Petitioner, vs. Frederick S. Kepner. Petition for a writ of certiorari and exhibit thereto. Filed January 6, 1941. Term No. 678, O. T., 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

MORISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The Baltimore and Ohio Railroad Company, a corporation organized and existing under the laws of the State of Maryland, respectfully shows to this Honorable Court:

A Summary Statement of the Matter Involved.

Your petitioner sought in the State courts of Ohio to enjoin the respondent from the prosecution of his action in the District Court of the United States for the Eastern District of New York under the Federal Employers' Liability Act, on equitable grounds sufficient under the law of

Ohio to justify such an injunction against the prosecution of such action in other than a Federal Court. To its petition respondent demurred and claimed that the provisions of Section 6 of the Federal Employers' Liability Act as amended Title 45 U. S. C., Sec. 56 (36 Stat. 291) prevented the courts of Ohio from exercising such equitable jurisdiction, and restraining the prosecution of said action, which contention was sustained by the Supreme Court of Ohio, being the highest court of that State. This contention of the respondent was made in the court of first instance, the Common Pleas Court of Hamilton County, Ohio, and was the basis of the decision of that court denying an injunction, a copy of the opinion of said court being annexed hereto as Appendix A. It was also the sole basis for the decision affirming such action of the Supreme Court of Ohio, as shown by its opinion (R. 34). *Baltimore & Ohio Rd. Co., Appellant* v. *Kepner, Appellee*, 137 Ohio St. 409, Advance Sheets in 13 Ohio Bar, December 23, 1940,—N. E. 2nd—. Therein the court said at page 411 of the report (R. 36):

> "The defendant's demurrer admits all well-pleaded facts including allegations to the effect that defendant's prosecution of his action against the railroad company in the District Court of New York more than 700 miles from his residence, and the place of his accident, will inconvenience and harass the railroad company, and will subject it to unnecessary expense. We may therefore assume that the equities shown by the petition favor the contention of the plaintiff, and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action. Defendant Kepner predicates his demurrer to the petition on the provisions of Title 45, Section 56, U. S. Code. * * *"

The syllabus by the court (R. 34) is as follows:

> "The state courts of this state cannot, in the exercise of their equity powers, enjoin a resident of the state from prosecuting a cause of action, arising under

> the Federal Employers' Liability Act, in a federal court of another state having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this state, and even though its prosecution in the federal court of another state may cause great inconvenience and expense to the defendant."

The facts alleged in the petition for injunction (R. 1-6) admitted by the demurrer, and assumed by the Ohio Supreme Court to support your petitioner's contention, and substantiated by affidavits (R. 23-31), are these:

Respondent is and for many years has been a resident of Hamilton County, Ohio (R. 2, 27). He was employed by your petitioner and was injured on May 18, 1939, while so employed at East Middletown, Butler County, Ohio, immediately adjoining Hamilton County to the north (R. 1, 2, 27). Petitioner operates lines of railroad in both counties and has numerous agents in each upon whom service can be made (R. 2, 27).

No suit has been filed by the respondent for his injuries in Hamilton or Butler Counties or in the United States District Court for the Southern District of Ohio, all of which courts are in constant session (R. 2, 3).

Respondent employed Morris S. Borden and Samuel T. Gaines, attorneys of Cleveland, Ohio, to represent him, each of whom are engaged in general practice of law in Cleveland, and respondent failed to avail himself of the courts immediately available and within a reasonable distance of the residence of any and all of the witnesses necessary for the trial, but by agreement and conspiracy among respondent and his counsel proceeded to file suit in the United States District Court for the Eastern District of New York (R. 2, 3).

To maintain its defense, petitioner will have to transport not less than twenty-five witnesses (R. 3, 25), all of whom

reside in Hamilton or Butler Counties, Ohio (R. 1), a distance of over seven hundred miles (R. 3). These witnesses consist of the employees of petitioner, numerous physicians, surgeons, radiologists, hospital attendants and others who gave him medical attention and numerous other non-employee witnesses as to various essential elements (R. 3, 4).

The medical witnesses are highly important because the nature and extent of respondent's injuries are seriously disputed. All of the others are important because liability is disputed (R. 28).

Petitioner would be totally deprived of its legal right of process to force the attendance of witnesses in the United States District Court, Eastern District of New York (R. 5), and they could not be compelled to attend a trial in New York and such as would consent to do so would have to be transported and maintained during the trial at great expense, which would be exceedingly heavy as to the medical experts. This expense would exceed by $4,000 the cost of the trial of the same issues in a court located near the residence of respondent (R. 4). The employee witnesses are engaged in interstate train service.

It is impossible to anticipate all of the witnesses that might be necessary and get them to the trial if needed (R. 5, 25, 29). The presentation of testimony by depositions cannot effectively present to the court and jury the facts involved, petitioner being deprived of the right of presenting the witnesses in person, and rebuttal evidence would be impossible of procurement and submission (R. 5, 25, 29).

Trials in the United States District Court, Eastern District of New York, are assigned in numerical order and it is impossible to tell the exact day the case will start (R. 4, 24). Therefore, it would be necessary to have the witnesses in New York a number of days prior to the probable date of trial because of the long distance involved (R. 4,

24). When the case is called for trial both parties must be ready to proceed forthwith.

Respondent conspired with his attorneys of Cleveland, Ohio, to bring the action at a distant point for the purpose of annoying, harassing and vexing the petitioner without a sound and proper purpose of reasonably prosecuting any right of action that respondent had against the petitioner (R. 6), and the continued prosecution of the action in New York would constitute an undue burden on interstate commerce and would be an unreasonable, improper and inequitable burden upon the petition, and such unreasonable and inequitable proceeding would result in no benefit to the respondent (R. 5, 6).

All of the foregoing facts were admitted by the respondent to be true.

The Court of Common Pleas of Hamilton County, Ohio, entered a temporary restraining order, enjoining and restraining the respondent from proceeding with said cause of action in the United States District Court for the Eastern District of New York (R. 14). Thereafter, on May 14, 1940, said court sustained a demurrer to the petition on the ground that the injunction prayed for would be in contravention of a right granted by the Federal Employers' Liability Act as amended, Title 45, U. S. C., Sec. 56 (36 Stat. 291) (R. 16). On May 15, 1940, an appeal was perfected in the Court of Appeals for the First Appellate District of Ohio, and on May 16 your petitioner presented to said Court of Appeals a motion for a temporary restraining order, at which time said court determined to pass on the appeal, and, it appearing on argument that a judgment sustaining said Common Pleas Court would be in conflict with the Court of Appeals of the Second Appellate District of Ohio (Appendix B, hereto attached, p. 14), said Court of Appeals of the First District did, from the bench, dismiss the petition and deny an injunction (R. 19), and

pursuant to Article IV, Section 6 of the Constitution of the State of Ohio, did thereupon certify said cause to the Supreme Court of Ohio, which court granted a restraining order on May 24, 1940 (R. 45). Thereafter said cause was heard on the merits by said Supreme Court of Ohio, and on July 10, 1940, said court by a three-to-three decision affirmed said Court of Appeals (*The Baltimore and Ohio R. R. Co., Appellant, v. Frederick S. Kepner, Appellee*, 137 Ohio State 206, 28 N. E. (2) 586) (R. 46). Thereafter, the court on October 2, 1940, granted a rehearing (R. 46), and after reargument said court again affirmed the judgment below in an opinion rendered December 18, 1940, 137 O. S. 409, Advance Sheet Ohio Bar, December 23, 1940, No. 40, and on December 20th restrained the respondent, the defendant-appellee in that court, from prosecuting his case in the District Court of the United States for the Eastern District of New York until this petition for certiorari might be determined by this Court (R. 48-49). Application for rehearing was thereafter filed and on December 31, 1940, denied by the Supreme Court of Ohio (R. 46, 49).

The Supreme Court of Ohio assumed that the equities alleged and admitted by demurrer were sufficiently great to warrant the granting of an injunction except that the Federal Employers' Liability Act barred the Ohio State courts from issuing an injunction against its citizens from proceeding in any Federal District Court, in which district the defendant shall be doing business.

It was the contention of your Petitioner that Congress did not expressly prohibit a court of a state from exercising its equitable jurisdiction over its citizens, that Congress merely gave the employee the right to sue concurrently in a state or federal court where the employer was doing business, that Congress could be presumed to have known that a court of equity had jurisdiction to prevent citizens of its jurisdiction from unjustly harassing and oppressing others

by bringing suits at a point farthest away from the residence of the employee and the situs of the accident and that as Congress did not expressly prohibit such equitable action a State court could restrain citizens of that state from such harassment in accordance with the well-founded principles of equitable jurisprudence.

The Supreme Court of Ohio by its said opinion rejected these contentions holding that Section 6 of the Federal Employers' Liability Act gave the injured employee the privilege of bringing his action in the District Court in any district, however remote, in which the defendant was doing business, when sued, and that the courts were without power to prevent his arbitrary and unreasonable choice of the farthest district, no matter how inequitable such choice might be.

Jurisdiction of This Court.

Jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. C., Title 28, paragraph (b), Section 344, authorizing petitions for writs of certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is set up or claimed under a statute of the United States. In this case a privilege or immunity was set up and, as we contend, erroneously sustained. The Common Pleas Court construed Section 6 of the Federal Employers' Liability Act as amended April 5, 1910, Title 45 U. S. C., Sec. 56 (36 Stat. 291), so as to prevent courts of Ohio from restraining the Respondent from maintaining vexatious and harassing litigation (Appendix A p. 11). Demurrer Sustained (R. 16). The Court of Appeals of Ohio, without opinion, likewise dismissed the petition (R. 19). And the Supreme Court of Ohio affirmed, and, on rehearing affirmed and so construed said Section 6 of the Federal Employers' Liability Act as to

prevent the courts of Ohio from restraining its citizen from maintaining vexatious and harassing litigation in a distant federal court under the Federal Employers' Liability Act.

The Supreme Court of the State of Ohio is the highest court of that State. Its decision (R. 34) in this matter is final. An application for rehearing was denied. (R. 49) The writ, if granted, would be directed to the Supreme Court. This petition is filed within twenty days of the date of the entry granting the temporary stay and injunction of December 20, 1940 (R. 46, 48). The bond required was filed within the aforesaid time limitation (R. 46).

Specification of Errors.

Your petitioner submits that the Supreme Court of the State of Ohio was in error in the following respects:

1. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals and of the Court of Common Pleas, and in not reversing the Court of Appeals and the Court of Common Pleas.

2. The Supreme Court of Ohio erred in failing to enjoin permanently the Respondent from prosecuting his suit pending in the United States District Court for the Eastern District of New York.

3. The Supreme Court of Ohio erred in its interpretation of the Federal Employers' Liability Act.

4. The Supreme Court of Ohio erred in construing the Federal Employers' Liability Act as preventing the courts of Ohio from enjoining a citizen of that state within the courts' jurisdiction from prosecuting an action under that Act in a Federal court so distant, and under such circumstances, as under the law of Ohio constituted vexatious, harassing, inequitable conduct subject to injunction.

5. The Supreme Court of Ohio erred in holding that the question involved was one of denying or interfering with the jurisdiction of the Federal courts.

6. The Supreme Court of Ohio erred in not applying the law of Ohio in determining what conduct of its own citizen was inequitable and subject to the injunctive power of the courts of that State.

Reasons for Granting the Writ.

It is submitted that the Court should entertain jurisdiction for the following reasons:

(a) The question is of importance as evidenced by the numerous reported decisions in the Federal and State courts, bearing more or less upon the questions involved, and referred to in the accompanying brief.

(b) The reported cases are in conflict.

(c) The question is one of substance which this Court should determine in the interest of uniformity and to avoid further litigation.

(d) The Supreme Court of Ohio misconstrued applicable decisions of the Federal Courts.

(e) The Supreme Court of Ohio misconstrued the Federal Employers' Liability Act.

In view of the importance of the question involved to the railroad companies of this country owing to the vast mileage covered by them and the unfair, unreasonable and unjust advantage inuring to the employee if permitted to seek out the point farthest away from his residence and situs of the accident to file his action, and in view of the conflict of the opinions of various courts on the question, concern-

ing which this Court has not made a decision, we submit this question should be decided by this Court and we contend further that it should be so decided that, in accordance with the principles of equity, a state court may be permitted on fair trial to determine whether or not the action of its citizen would result inequitably to the railroad company.

Your Petitioner presents herewith as a part of this petition a certified copy of the transcript of the record of the Supreme Court of Ohio and presents its brief for consideration with this petition discussing at greater length the questions involved.

Wherefore, your Petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of Ohio commanding said court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record of proceedings in said court entitled, "The Baltimore and Ohio Railroad Company, Plaintiff-Appellant, *v.* Frederick S. Kepner, Defendant-Appellee", and numbered 28205 in said court to the end that said case may be reviewed and determined by this Court and that the Petitioner may have such relief as this Court may deem proper, including a restraining order against Respondent enjoining him temporarily until final hearing by this Court from proceeding with his action now pending in the District Court of the United States for the Eastern District of New York, and that the opinion and judgment of the Supreme Court of Ohio may be reversed by this Honorable Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By MORISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

APPENDIX A.

COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO.

No. A-69867.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, *Plaintiff*,

vs.

FREDERICK S. KEPNER, *Defendant*.

Memorandum Opinion.

Heard on demurrer to petition, and
On motion to dissolve temporary restraining order.

RYAN, *J.*

The plaintiff, The Baltimore & Ohio Railroad Company, brings this action to restrain the defendant, Frederick S. Kepner, from prosecuting in the United States District Court of the Eastern District of New York an action arising under the Federal Employers' Liability Act. It is admitted that the plaintiff company was doing business in that district at the time the action was commenced.

The plaintiff herein alleges in its petition that it is a corporation organized under the laws of Maryland, with its principal office at Baltimore; that on May 18, 1939, the defendant Kepner sustained personal injuries at East Middletown, Butler County, Ohio, while engaged in the performance of his duties as a brakeman; that he now, and was at the time said injuries were sustained, a resident of Elmwood Place, Hamilton County, Ohio.

It is further alleged that the action brought by the defendant, more than seven hundred miles distant from his residence, will cause great inconvenience and unwarranted expense to the plaintiff herein in the matter of transportation and keep of witnesses; that it will be deprived of its right to compel the attendance of witnesses, and that it will

be required to depend on depositions for the trial of said cause; that it will be deprived of its right to present necessary rebuttal evidence, and that the prosecution of said action in the United States District Court of the Eastern District of New York will constitute an undue burden on interstate commerce and will be an unreasonable, improper and inequitable burden on the plaintiff herein with no benefit to the defendant Kepner.

The defendant demurs to the petition for the reasons that:

First. Petition does not state facts which show a cause of action, and

Second. That the court has no jurisdiction of the subject of the action.

The defendant Kepner predicates his demurrer on the provision of *Title* 45, *U. S. Code*, *Section* 56, which provides as follows:

> "Under this chapter an action may be brought in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

On consideration of the arguments of counsel, and an examination of the numerous authorities cited, the Court finds the weight of authority to be in accord with the decision in the case of *C. & O. Ry. Co.* v. *Vigor*, 90 Fed. (2d) 7, the pertinent syllabi of which are as follow :

> "2. Railway company held not entitled to injunction against administratrix' prosecution of action against it for employee's death, in Federal Court of the district in which it is doing business, on the ground of inconvenience or extra expense in producing witnesses residing in another state, wherein deceased was injured and administratrix resided.
>
> 3. Railway Company held not entitled to injunction against prosecution of suit against it, for employee's death, in Federal Court for district of another state than that in which plaintiff and defendant's witnesses

resided and deceased was injured, on the ground that defense of such suit would place unreasonable burden on interstate commerce.

4. Congress, having power to regulate interstate commerce, may place incidental burdens thereon, by jurisdictional statutes, such as act authorizing filing of suit for damages under Federal Employers' Liability Act in any district wherein defendant is doing business,"

and wherein the Court said at page 8:

"The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held in Southern Railway Company *v.* Cochran, 56 F. (2d) 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority, and it is controlling in the case at bar."

As to the case of *N. Y. C. & St. L. Rd. Co.* vs. *Matzinger*, 136 O. S., 271 (Ohio Bar, February 12, 1940), cited by defendant, this Court is of the opinion that it is readily distinguishable from the instant case for there the question of an express statutory right granted by Congress was not involved. In its opinion the Court states that the decree "is not in contravention of any right given by the Constitution or laws of the United States."

Considering the case of *B. & O. R. R. Co.* vs. *Inlow, No.* 3111, Franklin Court of Appeals, wherein the Court on rehearing reversed its former decision in order to follow the ruling made in the *Matzinger* case, it appears that there, as in the instant case, the question of an express statutory

right granted by Congress was involved and the decree which granted the restraining order was in contravention of the right granted by *Title* 45, *U. S. Code, Section* 56.

In view of the above the Court concludes that it is not obliged to regard either of the above Ohio decisions as authority determinative of the questions here presented.

Wherefore, the Court finds the demurrer to the petition herein to be well taken and does therefore sustain the same.

In addition to the demurrer the defendant has filed a motion to dissolve the temporary restraining order heretofore issued. In view of the ruling on the demurrer, the Court now finds said motion to be well taken and does therefore grant the same.

Entries will be made in accordance herewith.

* * * * * * *

May 10, 1940.

APPENDIX B.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

THE BALTIMORE & OHIO RAILROAD COMPANY, *Plaintiff-Appellant*,

v.

ORRIS E. INLOW, *Defendant-Appellee*.

Decision.

Rendered on the 20th day of March, 1940.

HORNBECK, *P. J.*

Submitted on applicaton of appellant for rehearing upon the authority of *New York Central and St. Louis R. R. Company* v. *Matzinger*, 136 O. S. 271. This decision was reported after we had handed down our opinion in this case, and we therefore did not have the benefit of it when we considered the case in the first instance on its merits.

We have not only examined the decision of the Supreme Court, but we have secured and carefully considered all the facts appearing in the case as found in the briefs of the parties filed in the Supreme Court. We are required to say that in all essential facts the *Matzinger* case is like unto the instant case, and therefore the opinion of the Supreme Court is controlling upon us and requires us to now change our position and to hold that the demurrer to the petition should have been overruled, and the defendant required to plead.

No other course is open to this Court in view of the liberal construction which must be accorded the petition under our Code provision, Section 11345, G. C. The judgment of the trial court in this case being predicated upon the sustaining of the demurrer to the petition, there is no ground for differentiation of fact or exercise of discretion as to the issuance of the injunction, as prayed. These prerogatives will arise only after issues are properly drawn.

Rehearing granted. Judgment reversed. Cause remanded.

HORNBECK, *P. J.*, and BARNES, *J.*, concur.
GEIGER, *J.*, dissents.

APPEARANCES:

JAMES I. BOULGER,
Attorney for Plaintiff-Appellant.

LEO G. HANNA, Chicago, Ill., and
PAUL T. KEY,
Attorneys for Defendant-Appellee.

GEIGER, *J.*, dissents:

On the 7th day of February, 1940, this Court rendered a decision in the above entitled case affirming the Court below and holding in substance that inasmuch as Congress has granted the workman a choice of the forum, the state court has no power to enjoin the workman from exercising this right for any but the most substantial reasons.

The Supreme Court on the same day rendered an opinion in the case of *New York, Chicago & St. Louis R. R. Co.*,

Appellee v. *Matzinger, Appellant*, 136 O. S. 271. This opinion was not available to this Court until after its opinion had been rendered.

Thereupon counsel for the plaintiff-appellant filed an application for rehearing based upon the holding of the Supreme Court above referred to.

The facts in the two cases are quite similar but not identical.

The question, however, remains as to whether the Supreme Court decision requires this Court to reverse its judgment. This Court gave the reasons why it considered the Court without power to restrain the plaintiff and sustained the Court below in its decision to the same effect. In the case before the Supreme Court the trial court took the same position as was taken by the trial court in this case, but that judgment was reversed by the Court of Appeals, and the Supreme Court sustained the Court of Appeals.

The most that can be claimed for the Supreme Court decision is that this Court would have been sustained in reversing the Court below and granting the injunction. The decision, however does not require this Court to reverse itself if it is of the opinion that the facts stated in the petition did not justify the issuance of a restraining order. I am still of the opinion that under the facts in the case at bar the Court below was not in error in overruling the application for an injunction and that this Court was not in error in sustaining the Court below. I refer to our original opinion.

APPENDIX C.

Statute Involved.

45 U. S. C., Sec. 56. Actions; limitations; concurrent jurisdiction of courts; removal of case in State court. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the resi-

dence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States (Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER.

BRIEF IN SUPPORT OF THE PETITION.

This brief, in support of the Petition for a Writ of Certiorari, seeks to reverse the judgment of the Supreme Court of Ohio denying the petitioner's application for an injunction to restrain the respondent from prosecuting a suit under the Federal Employers' Liability Act, in a Federal District Court in the Eastern District of New York. The court sustained the contention of the respondent and based its denial solely because Section 6 of that Act prevented it from granting an injunction that otherwise would have been granted.

The opinion below is *The Baltimore & Ohio Railroad Company, Appellant,* v. *Kepner, Appellee,* 137 Ohio St. 409, decided December 18, 1940, on Rehearing, published in advance sheets, 13 Ohio Bar for December 23, 1940 (R. 34).

Statement of the Case.

In the interest of brevity the court is respectfully referred to the Petition for a Writ of Certiorari herein in which is recited a statement of the facts, as well as a statement of the history of the case, and also to the opinion of the Ohio Supreme Court.

The statute involved is Section 6 of the Act as amended in 1910 (45 U. S. C. § 56): See Appendix "C" Petition for Certiorari, p. 16.

Summary of Argument.

I.

Equity has inherent power to restrain the prosecution of vexatious and harassing litigation.

Pomeroy on Equity Jurisdiction, 3rd Ed. Vol. 4, Sec. 1360, and Vol. 6, Sec. 670;

Cole v. *Cunningham*, 133 U. S. 107;

Snook v. *Snetzer*, 25 O. S. 516;

N. Y. C. & St. L. Rd. Co. v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349.

II.

The Federal Act did not enlarge nor take anything from the jurisdiction of the State courts.

Douglas v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377, and cases in the argument, bottom of page 383.

III.

The Federal Act contains no express prohibition against the States exercising their inherent powers of equity. Such a prohibition is not to be inferred from the Act.

Maurer, et al. v. *Hamilton, et al.*, 309 U. S. 598, 614;

Reid v. *Colorado*, 187 U. S. 137, 148.

IV.

The Federal Act was not a regulation complete in itself, but left the State courts free to act in various ways.

Seaboard Air Line Ry. v. *Kenney*, 240 U. S. 489.

V.

The restraint of a party to a suit is not tantamount to the restrain of the court itself.

Steelman v. *All Continent Corporation*, 301 U. S. 278, 290, 291.

VI.

The facts in the present case are sufficient to invoke the equitable powers of a court.

B. & O. Rd. Co. v. *Kepner*, 137 Ohio St. 409 (R. 34).

VII.

The weight of authority supports the right to injunction and the Supreme Court of Ohio erred in holding otherwise.

VIII.

The Supreme Court of Ohio misconstrued the Federal Act, applicable decisions, and cited, in support of its conclusions, cases not applicable.

IX.

Whether the conduct of an Ohio citizen is equitable is a question of law, which an Ohio court having jurisdiction of the citizen is to determine in accordance with that law unless Congress within its delegated powers has made an enactment inconsistent with the Ohio law.

Statement of the Questions Involved.

The rule of the Supreme Court of Ohio is that the syllabus which is by the court states the law of the case, 136 O. S.

Rules of Practice, Page LXXII, Rule VI. It is to be read in the light of the facts as stated in the opinion. Rule VI. See also *The B. & O. Rd. Co.* v. *Baillie*, 112 O. S. 567, Syl. 2. The syllabus of the opinion below reads:

> "The State courts of this State cannot, in the exercise of their equity powers, enjoin a resident of the State from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a Federal Court of another State having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this State, and even though its prosecution in the Federal Court of another State may cause great inconvenience and expense to the defendant."

Your petitioner contended below that there is nothing in the Federal Act to prevent a State court from enjoining a citizen of that State from prosecuting an action under the Federal Act, whether in a State or Federal Court, where that prosecution would, under the circumstances, be inequitable, harassing, vexatious and contrary to the best interests of justice. And that the venue provisions of Section 6 of the statutes did not permit the employee to exercise his right of choice between the various jurisdictions available to him in an inequitable manner.

The respondent contended that under the Federal Act he could not be restrained from such prosecution in any Federal District Court in whose district the railroad did business, even though such prosecution would be in violation of the equitable principle just referred to.

It is submitted that the Ohio Courts erred in sustaining respondent's contention.

ARGUMENT.

Courts of Equity Have Inherent Power to Enjoin the Prosecution of Suits Under Harassing, Vexatious, and Inequitable Circumstances.

This power, we submit, is inherent in all Courts, State as well as Federal. The author in *Pomeroy's Equity Jurisprudence* (3rd Ed. Vol. 4, Sec. 1360) says:

> "The use of injunctions to stay actions at law was coeval with the establishment of chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction."

In *Snook* v. *Snetzer*, 25 Ohio St. 516, the Court enjoined a citizen from prosecuting an attachment in West Virginia against another Ohio citizen whose earnings were exempt in Ohio but not in West Virginia.

In *N. Y. C. & St. L. R. R. Co.* v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349, the syllabus, by the court, reads:

> "A Court of equity may restrain a person over whom it has jurisdiction from bringing or maintaining in a foreign State an action for the purpose or with the effect of unduly harassing or oppressing the defendant, or securing to the plaintiff some unfair, unconscionable or inequitable advantage."

Ohio cases are collected in 11 Ohio Jur., Courts, Sec. 80, 16 Ohio Jur., Equity, Sec. 102, 21 Ohio Jur., Injunction, Sec. 141.

Snook v. *Snetzer*, *supra*, was followed with approval by this Court in *Cole* v. *Cunningham*, 133 U. S. 107, a case cited throughout the decisions bearing upon the equitable principle involved. In *Cole* v. *Cunningham*, this Court followed

Dehon v. *Foster*, 4 Allen 545, (Mass.), and at the middle of page 124 said:

> "Dehon *v.* Foster, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, C. J., points out that the jurisdiction of a Court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon a proper case made, either in the Courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in Courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that, as the decree of the Court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

Cole v. *Cunningham* was last cited by this Court in 1936, in *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 291.

The Federal Employers' Liability Act Does Not Foreclose the Exercise of the Equity Powers of the State Courts.

There is nothing in the Act expressly prohibiting the exercise by the State Courts of their equity powers in a matter of this kind. On the contrary, we find that various powers of the State Courts have been upheld as against the Federal Act.

In *Douglas* v. *N. Y., H. & N. H. R. Co.*, 279 U. S. 377, the question was as to the right of a Connecticut citizen, where the accident happened in Connecticut, suing under the Federal Act in a New York State Court, a Connecticut corporation, doing business in New York. This Court invoked a New York statute that authorized the State Courts to dismiss the action. The last paragraph of the opinion, page 387, reads:

"As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57."

A State Court may order a conditional remittitur of damages. *Roy* v. *Oregon S. L. R. Co.*, 55 Idaho 404, 42 Pac. (2d) 476, c. d. 296 U. S. 579.

States retain full control over administrators and executors appointed by its Courts. *Spoo* v. *C. R. I. & P. Ry. Co.*, 191 Iowa 1134, 183 N. W. 850.

State procedure is sustained even though perjury of witnesses is proved. *Taylor* v. *C. C. C. & St. L. Rd. Co.*, — Mo. —, 63 S. W. (2d) 69, c. d., 290 U. S. 695.

The states may say whether the jury shall be unanimous or whether nine or less may return a verdict. *M. & St. L. R. R. Co.* v. *Bombolis*, 241 U. S. 211.

The states may decide who are the next of kin. *S. A. L. Ry.* v. *Kenney*, 240 U. S. 489.

The states may decide who is a beneficiary. *M. & S. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66.

The states may determine the rate of interest on judgments. *N. Y., N. H. & H. R. R. Co.* v. *Marmann*, 253 N. Y. S. 450, c. d. 288 U. S. 601.

The states may decide what constitutes service of summons. *Klinge* v. *So. Pac. Co.*, 65 F. (2d) 85, c. d. 290 U. S. 657.

The states may decide these cases under the state rules of pleading. *Williams* v. *St. L. & S. F. RR. Co.*, 85 S. W. (2d) 624, — Mo. —.

An award under a state compensation law is a bar to a judgment in a suit under the Act. *C. R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611.

The state may prohibit a suit under the Act jointly against a railroad and a fellow employee. *Lee* v. *Cent. of Ga. Ry. Co.*, 252 U. S. 109.

A state venue statute was sustained in an action under the Federal Act. *Loftus* v. *Penn. R. Co.*, 107 Ohio St. 352; *Doll* v. *C. Y. W. Ry. Co.*, 159 Minn. 323, 198 N. W. 1006.

A state statute for a lien for an attorney's fee held good in an action under the Act. *Dickinson* v. *Stiles*, 246 U. S. 631.

A state statute providing a penalty for a frivolous appeal was sustained. *L. & N. R. Co.* v. *Stewart*, 241 U. S. 261.

Employees always had a right to sue a railroad for negligence. When Congress passed the Statute it knew that the courts had inherent power to enjoin citizens from maintaining harassing litigation. In *Maurer, et al.* v. *Hamilton, et al.*, 309 U. S. 598, this court, top of page 614, said:

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

The same principle was expressed by Mr. Justice Harlan in *Reid* v. *Colorado*, 187 U. S. 137, 148:

> "* * * It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should

> be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243."

We contend that there is nothing in the Act to show that Congress intended to nullify the equity powers of the State courts in cases arising under the Act.

Congress, as much as the courts, must have realized that the broad venue provisions of the act might result in inequitable use of such provisions and have left the courts unfettered to prevent by injunction such inequitable action.

The injunction would not have deprived the respondent of any right specifically granted by the Act. It reads, "An action may be brought in a District Court of the United States in the district * * * in which the defendant shall be doing business at the time of commencing such action." Notwithstanding the injunction he still could sue in the district in which the defendant shall be doing business convenient for him and all parties. The statute does not say he can sue in any district in which the defendant shall be doing business, although the Supreme Court of Ohio and other courts have erroneously assumed that Congress intended "the district" to mean "any district".

This Court prohibits actions under the Act in state courts if the business in that jurisdiction of the defendant is only the maintenance of an office for solicitation where the prosecution thereof would burden interstate commerce and no reason is apparent for a distinction were the selected tribunal a federal district court. *Michigan Cent. R. R. Co.* v. *Mix*, 278 U. S. 492, 73 L. Ed. 470.

The Restraint of a Party to a Suit is Not Tantamount to the Restraint of the Court Itself.

It is not and never has been contended by the Petitioner that an injunction by the Supreme Court of Ohio would

in any way interfere with or impair the jurisdiction of the District Court of the United States for the Eastern District of New York. The action was only to enjoin the respondent, who is a citizen of Ohio and subject to the jurisdiction of the Common Pleas Court of Hamilton County, Ohio, on the ground that he was using a legal process in an inequitable, unconscionable and vexatious manner by proceeding with his action brought in that distant court. The language of Mr. Justice Cardozo in *Steelman, Trustee in Bankruptcy* v. *All Continent Corp.*, 301 U. S. 278, 290, is appropriate. He said, omitting citations:

> "The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. Suits as well as transfers may be the protective coverings of fraud. We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

Judge Learned Hand, for the Circuit Court of Appeals, Second Circuit, in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, at page 571, near the end of the second column said:

> "For the Virginia suit was based upon the notion that plaintiff was using inequitably a legal right—the right of action under the Federal Employers' Liability

Act—just as he might use the legal title to land inequitably."

We submit that Congress did not grant the employee a Federal right to do an inequitable thing and one which equity would enjoin but for the Act. The granting of an injunction by Ohio courts would not deny the respondent a Federal right because Congress has not given a right to bring an inequitable action. To express it differently, Congress has not attempted either expressly or by implication to deprive the State courts of their jurisdiction in equity. The State of Ohio is a sovereignty having inherent rights to control its citizens from maintaining unjustly harassing and vexatious litigation. That inherent right was not expressly denied in the Federal Act and unless expressly denied the statute must be strictly construed against a denial of such right by implication.

Facts Justifying Injunction.

This Court is familiar with the serious burden on interstate commerce from the prosecution of tort cases in remote jurisdictions. *Davis, Director General* v. *Farmers' Cooperative Co.*, 262 U. S. 312; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492. It is held that such burden to interstate commerce bars the prosecution of such suits. In *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, the Court held that such burden on interstate commerce is not a bar to the prosecution of an action under the Federal Employers' Liability Act in a jurisdiction where the defendant railroad owns and operates railroad lines. There is presented in this case something more than mere burden on interstate commerce. It is alleged that the Ohio plaintiff, Kepner, and his Ohio counsel conspired to bring his action in the Eastern District of New York for the purpose of annoying, harassing and vexing petitioner herein, the railroad com-

pany, without a sound and proper purpose of reasonably prosecuting any right of action that Kepner may have against the railroad company. Brooklyn, New York, where the action is pending, is eight hundred miles from the scene of the accident and seven hundred seventy-five miles from the residence of Kepner. The railroad company has twenty-five witnesses, all in Hamilton and Butler Counties, Ohio, none of whom are subject to subpoena in the pending action. It has never been claimed that Kepner has any witnesses other than those in Ohio. It is impossible to ascertain in this District Court a definite time of trial and it would be necessary to be ready for trial and the railroad company have its numerous witnesses in New York several days before the probable date of trial and to be maintained there for all of the said period, in addition to the time necessary for the trial itself, and the actual cost would exceed that in a jurisdiction adjacent to the accident or residence of Kepner by at least $4000.00.

The inequity in this prosecution exceeds the inequity in the case of *N. Y. C. & St. L. Rd. Co.* v. *Matzinger*, 136 O. S. 271, and that in *Denver & R. G. W. R. Co.* v. *Terte*, *supra*. This Court will take judicial notice, as did the Ohio Supreme Court in the Matzinger case, of the fact that the presentation of evidence by deposition is unsatisfactory and also of the fact that it is obvious that rebuttal evidence would be impossible of procurement and submission. Where there is a large number of physicians and surgeons, as is the case herein, a more than usual amount of expense and annoyance is involved especially where such witnesses have to travel a long distance and be maintained a long and extended period of time awaiting opportunity to testify.

The Ohio courts below were asked to regulate the conduct of an Ohio citizen in accordance with the law of the State as declared by its Supreme Court governing his action with respect to the prosecution of actions of this character.

What constitutes proper conduct of a citizen of Ohio is determinable by the laws of Ohio. The Supreme Court of Ohio below (R. 36) said:

> "We may, therefore, assume that the equities shown by the petition favor the contention of the plaintiff and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action."

This Court has pointed out in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, that the law of a State is that contained in the decisions of its courts as well as in its statutes and that the laws of the State are as binding on the Federal courts as on the State courts.

When one considers the tremendous amount of litigation that goes on under the Federal Employers' Liability Act and the possibility of the tremendous increase in the cost both of time and money in such litigation if it be the law that the plaintiffs therein may resort to the District Court of the United States having jurisdiction farthest removed from the plaintiff's residence and the scene of the accident, it must be concluded that there be in the courts an adequate remedy to prevent such abuse of the mere right of venue.

If, as the Court said in the Davis case, *supra*, 262 U. S., suits against carriers, especially at far distant points, is an undue burden on interstate carriers, then it is all the more a burden and an harassment to have railroad employees at the present time carried far distances, as here, and kept from their work for a long and indefinite period attending the trial, when they should be at work assisting transportation due to the emergency confronting the country today, as is evidenced by the numerous recent enactments of Congress, of which, we submit, the Court must take judicial notice.

Authorities Sustaining Right to Injunction.

Injunctions against the prosecution of inequitable and harassing actions under the Federal Employers' Liability

Act in distant State courts have been often sustained by the decisions of the highest courts of the State.

Reed's Admrx. v. *Illinois Central R. R. Co.*, 182 Kentucky 455, 206 S. W. 794.

At page 464, Judge Carroll for that court said:

> "We do not, however, give to this statute the peremptory effect claimed for it by counsel for the administratrix or agree with their contention that, as it was allowable under the act to bring this suit in the State of Minnesota, therefore the plaintiff could not be restrained by injunctive process from prosecuting it to a conclusion in that state. * * *
>
> "The Federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience."

Louisville & Nashville R. Co. v. *Ragan*, 172 Tenn. 593, 113 S. W. 743.

Kern v. *C. C. C. & St. L. Ry. Co.*, 204 Indiana 595, 185 N. E. 446.

State of Missouri ex rel., N. Y. C. & St. L. R. R. Co. v. *Nortoni*, 331 *Missouri* 764, 55 S. W. (2d) 272.

See also:

Chicago, M. & St. P. R. R. Co. v. *McGinley*, 175 Wis. 565, 185 N. W. 218.

It was there said at the bottom of page 220:

> "There is nothing in the Federal Employers' Liability Act as amended, which is indicative of an intent on the part of Congress to prohibit a court of equity from so regulating the conduct of its own citizens by an injunction, as to prevent hardship, oppression, or

fraud, and if prior to the passage of such Employers' Liability Act, the power existed in a court to grant relief by injunction as indicated, such power continued to exist and now exists."

New York, C. & St. L. R. R. Co. v. *Perdine*, 97 Indiana App. 517, 187 N. E. 349.
Alspaugh v. *N. Y. C. & St. L. R. Co.*, 98 Indiana App. 280, 188 N. E. 869.

This action of the State courts has been recognized as valid in the United States Circuit Court of Appeals in the Seventh and Second Circuits.

Ex Parte Crandall, 53 F. (2d) 969 (CCA-7), c. d. 285 U. S. 540.

We quote from page 971, second column:

"The general right of Indiana citizens to begin actions of this nature, wherever service of process on the defendant could be had, *was always potentially qualified by the jurisdiction of equity to restrain the citizen from commencing the action in a foreign jurisdiction, where to do so would unreasonably, inequitably, and unfairly harass, oppress or defraud the defendant.*

"*The Federal Employers' Liability Act does not assume to remove this qualification*, and in our judgment does not exempt the citizen from invocation against him of this equitable jurisdiction under facts which would in general justify its application." (Italics ours).

Bryant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, (C. C. A.-2). At page 571, first column, it is said:

"* * * *The situation here is quite different; for even if the Virginia court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction.* * * * In the case at bar the questions ad-

judicated in Virginia were not those decided by motion in the Federal action. The Virginia decree was not granted because the action would burden interstate commerce, *but because it would unfairly vex and oppress the defendant, quite another ground.* * * *" (Italics ours).

Injunctions against the prosecution of such cases in distant Federal District Courts have been granted.

B. & O. R. R. Co. v. *Bole*, 31 Fed. Supp. 221.

Atlantic Coast Line R. R. Co. v. *Bryant* in Virginia, referred to in *Bryant* v. *A. C. L. R. R. Co.*, 92 F. (2d) 569, supra.

B. & O. R. R. Co. v. *Inlow* (Unreported) referred to by the Court below. Decision attached to petition for certiorari appended.

Authorities Denying or Claimed to Deny Right to Injunction.

The Supreme Court of Indiana has held that the terms of section 6 of the Federal Employers' Liability Act prevent a State court from enjoining a plaintiff in an action under that act from prosecuting a claim in any United States District Court in which the defendant does business. *McConnell* v. *Thomson*, 213 Indiana 16, 8 N. E. (2d) 986.

This decision was made notwithstanding the recognition in Indiana of the right to an injunction when the action under the Federal Employers' Liability Act is brought in a distant State court.

Kern v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 204 *Indiana* 595, 185, N. E. 446.

The Supreme Court of Ohio below at page 419 (R. 42) cites eight cases as supporting "by the overwhelming

weight of authority" the doctrine of *McConnell* v. *Thomson*, *supra*.

Of the cases cited, all but one related solely to the question of jurisdiction of the court in which was brought the action against the railroad under the Federal Employers' Liability Act. Of course, a court given jurisdiction by the Federal statute cannot refrain from exercising that jurisdiction when invoked pursuant to the statute. The four following cases were decisions on motions to dismiss for want of jurisdiction, or to set aside service, involving only the question whether or not the defendant railroad was doing business at the point served, or whether that jurisdiction could be denied by the court because of interference with interstate commerce. In none of them is there a consideration of the equitable principles asserted herein.

Connelly v. *Central R. R. Co., of New Jersey*, 238 Fed. 932;

Norris v. *Illinois Central R. R. Co.*, 18 F. (2d) 584;

Wood v. *Delaware & H. R. Corp.*, 63 F. (2d) 235 (C. C. A.-2);

Trapp v. *Baltimore & Ohio R. R. Co.*, 283 Fed. 655.

Southern Railway Co., v. *Cochran*, 56 F. (2d) 1019, was a decision of the Sixth Circuit Court of Appeals refusing a writ of prohibition against a District Judge to prevent his entertaining jurisdiction of an action under the Federal Employers' Liability Act. It did not seek an injunction against the plaintiff in a Federal Employers' Liability action, and involved solely a consideration of the jurisdiction of the District Court.

C. M. & St. P. R. Co. v. *Schendel*, 292 Fed. 326, s. c. 300 Fed. 273, was decided by the Eighth Circuit Court of Appeals on the basis that the Federal Court having acquired jurisdiction of an action under the Federal Em-

ployers' Liability Act had power to protect that jurisdiction to the extent of enjoining the railroad and others from interfering in the Iowa State courts with a proceeding in the Federal Court in Minnesota. The equitable phases were not involved. The court near the bottom of page 334 expressly says:

> "* * * We do not feel called upon to discuss the cases cited where the courts have held that equity may enjoin citizens of one state from bringing action in other jurisdictions. They do not apply to this situation. We are satisfied that the order was not issued on equitable grounds of oppression or hardship, but on the ground that the public policy of the state was being violated."

Hoffman, Judge, v. *Missouri, ex rel. Foraker*, 274 U. S. 21, considered the jurisdiction of a State court of a Federal Employers' Liability action in a Missouri county traversed by the railroad, when the accident occurred in Kansas and the deceased was a citizen of that state. The defendant was a Missouri corporation, and the question raised and decided in that case was that the incidental burdening of interstate commerce did not interfere with the jurisdiction of the State Court.

C. & O. Ry. Co. v. *Vigor*, 90 F. (2d) 7, (C. C. A.-6) was a case in which the Federal District Court for the Southern District of Ohio was asked to enjoin the prosecution of an action in the Federal District Court for the Northern District of Indiana on the ground of inequitable conduct on the part of the plaintiff in the Indiana suit, and unconscionable hardship imposed on the defendant in that suit by its prosecution at a distance from the scene of the accident, the residence of the plaintiff, and the residence of her decedent, all of which were in Ohio. A reason assigned by the court for its decision was that the facts alleged in the bill and set forth in the supporting affidavits did not justify the

court in reversing the court below. At page 8 the court said:

> "We find no fact alleged in the bill or set forth in the supporting affidavits that would justify us in saying that the trial of the cause in the Indiana court would cast an unreasonable burden on the plaintiff or would give to the defendant an inequitable advantage."

The cases cited, therefore, do not sustain the point to which they are cited by the Supreme Court of Ohio, nor the principle of the decision of the Supreme Court of Indiana in *McConnell* v. *Thomson, supra.*

The court also cited 28 *American Jurisprudence* 400, Sec. 217, an authority which relies in part upon *McConnell* v. *Thomson, supra,* which, it is submitted, was wrongly decided. In Note 19 various cases of this court are cited to the general rule that State courts have no authority to enjoin proceedings in the Federal courts. None of these cases are at all like the case at bar. Four cases in 6 *Wallace* are cited, involving the same principle, the important opinion being *Riggs* v. *Johnson Co.,* 6 *Wallace* 166, 18 L. Ed. 768, in which the Supreme Court held that it was no defense to a mandamus proceeding in the Circuit Court of the United States against the County Commissioners requiring them to levy a tax to pay the judgment on county bonds awarded by that court; that the Commissioners had been enjoined in a State court from levying such tax, the suit for such injunction having been brought subsequent to the Circuit Court's judgment on the bonds. *Central National Bank* v. *Stevens,* 169 U. S. 432, 42 L. Ed. 807, is a case decided on the same general principle, in which a State court attempted to enjoin parties to a decree in the Circuit Court of the United States, determining their rights in their favor, from availing themselves of that decree, and com-

pelling them to re-litigate their rights in the State court. *Moran* v. *Sturgis*, 154 U. S. 256, 38 L. Ed. 981, 14 S. Ct. 1019, was a case reversing an injunction granted in a State court against parties claiming to hold marine liens, from prosecuting their proceeding in Admiralty under which the U. S. Marshal had seized vessels belonging to a corporation which the State court was winding up, which seizure by the Marshal was made on the same day that State receiver was appointed or before the State receiver had taken possession.

Two other cases cited—*Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, 19 S. Ct. 119, and *Prout* v. *Starr*, 188 U. S. 537, 47 L. Ed. 584, 23 S. Ct. 398, were not cases involving injunctions by State courts, but, in the first was held invalid an injunction by the United States Circuit Court against the Commonwealth Attorney from prosecuting a criminal proceeding involving a decision of different questions from that to be determined in the United States Circuit Court, while in the second case, an injunction of the United States Circuit Court against Prout, Attorney General of Nebraska, was sustained, which order, among other things, enjoined him from proceeding with his action in a State court in which he sought a judgment contrary to a prior injunction in the United States Circuit Court against his predecessor and stipulations therein that that case would abide the judgment of *Smyth* v. *Ames*, 169 U. S. 466. No injunction was sought in the State court.

In the case at bar there is no attempt to have the State courts of Ohio draw to themselves or pass upon any of the issues of the case in the District Court of the United States for the Eastern District of New York, nor to compel the plaintiff therein to litigate his question in a State court. It would be entirely consonant with any injunction to be rendered, that the plaintiff employe bring his action in the District Court, the venue of which would be a reasonable

one for the determination of the issues. The issues in the State court were entirely distinct from the issues to be determined in the Federal Court.

There is also cited in 28 *American Jurisprudence* 400, *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 266, 43 S. Ct. 79, 24 A. L. R. 1077, holding that a State court and a Federal court may each litigate the same questions at the same time, without interference, one with another, where the actions are *in personam*. Such was the principle applied by the Circuit Court of Appeals for the Second Circuit in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, applying the principle to an action for damage under the Federal Employers' Liability Act pending in the United States District Court for the Eastern District of New York, and a suit for an injunction by the defendant therein against the plaintiff in the State court of Virginia, based on the inequity of the proceeding in New York.

It is therefore submitted, that there is no overwhelming weight of authority, as said by Judge Hart in his opinion at page 419 (R. 42), that the jurisdiction of the Federal Courts to determine causes arising under the Federal Employers' Liability Act cannot be interferred with by a State, or by a State or other courts.

Error of Indiana and Ohio Courts in Holding That Federal Employers' Liability Act Prevented Injunction of Prosecution in Federal Court.

The Indiana Supreme Court in *McConnell* v. *Thomson*, *supra*, and the Ohio Supreme Court, assumed that the plaintiff in an action under the Federal Employers' Liability Act is given a right by that act to sue the defendant railroad company in any United States District Court, in the district of which the defendant does business, and that such a right conferred by Federal statute cannot be interfered with by

the courts, whereas, the plaintiff's right to sue in any State court having jurisdiction of the subject matter of the litigation, and of the defendant railroad company, is not a right given by Federal statute, and if his action in a State court be inequitable its prosecution may be enjoined. The error in this position is that the plaintiff's right to sue in the court of another state than that of his residence, is a right conferred upon him by Section 2, Article IV of the United States Constitution, as construed by this court.

Blake v. *McClung*, 172 U. S. 239, 256;

Chambers v. *B. & O. R. R. Co.*, 207 142, 148;

Missouri Pacific R. Co. v. *Clarendon Co.*, 257 U. S. 533, 535.

A right conferred by the Constitution of the United States is certainly as important as a right conferred by statute. Equity can and should prevent an inequitable exercise of either right. The constitutional right to sue in a court of another state does not prevent a court at the domicil of that plaintiff from enjoining an inequitable invoking of that right.

Cole v. *Cunningham*, 133 U. S. 107, 109, 134; 14 R. C. L. 412, Sec. 113, *Injunctions*; 28 *American Jurisprudence* 392, Sec. 206.

That a Federal statute confers the right to sue in a Federal court does not prevent another court from enjoining plaintiff in a suit brought pursuant to such statute from further prosecution thereof, when such prosecution is inequitable or fraudulent.

Steelman v. *All Continent Co.*, 301 U. S. 278, 290.

The Supreme Court of Ohio Erred in Its Interpretation of the Bryant Case.

We call attention to the court's statement on page 421 of its published opinion (R. 43) where it said:

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the State Court of Virginia to enjoin the plaintiff from prosecuting his action in the Federal Court."

The Circuit Court of Appeals was not trying the injunction suit which the Railroad Company had brought in a State Court of Virginia; on the contrary, it was deciding against an injunction by the employe sought in the Federal Court in Brooklyn to restrain the Railroad Company from acting in the Virginia State Court. Near the bottom of the first column, page 571, the court, in the *Bryant* case, said:

> "The situation here is quite different, for even if the Virginia Court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction."

It seems to us, therefore, that the court's language in the *Bryant* case specifically was that the State Court of Virginia had jurisdiction to enjoin the employe from prosecuting his suit in New York. It concluded that the action for damages in the Federal Court in New York could proceed, as could also the action of the Railroad for an injunction in the Virginia Court. If, as the Supreme Court said, the court in the *Bryant* case did not approve the Virginia injunction, then what did the Circuit Court of Appeals mean by the quoted language? The Federal Court did not interfere with the prosecution of the Virginia injunction case, but said that it could progress, at the same time as the suit for damages in New York.

The Supreme Court of Ohio, we contend, appears to have fallen into an error, not unusual in these cases, of overlooking the fact that equity acts *in personam*, and that an action to enjoin is not an action against the foreign court, but against the State citizen who, it is claimed, is using a legal right in an equitable manner.

Closing Summary.

The power of courts of equity to enjoin citizens within their jurisdiction from prosecuting harassing and vexatious litigation in remote jurisdiction is well established and is not prevented by the constitutional provision guaranteeing the right to sue in the court of any State having jurisdiction of the subject matter of the litigation. The right granted by section 6 of the Federal Employers' Liability Act to bring an action in the district "in which the defendant shall be doing business" must have been granted in the light of that power of equity to restrain in a proper case the abuse of the right due to the very great extent of territory in which the railroads do business. An injunction to prevent prosecution of such action vexatiously many hundred miles distant from the residence of plaintiff, the place of the accident and the location of the witnesses, still leaves in the plaintiff the right to bring his action in a convenient district in which the defendant does business. The statute does not expressly provide that he may bring his action in every such district. This Court prohibits such actions in State courts if the business is only the maintenance of an office for solicitation, where the prosecution thereof would burden interstate commerce, and no reason is apparent for a distinction were the selected tribunal a Federal District Court. The Federal Employers' Liability Act nowhere expressly denies the right to the equitable relief sought by the petitioner and denied by the Ohio courts. Displacement of the

local law is not to be inferred unless clearly indicated by considerations persuasive of the statutory purpose. The State law must yield only if the purpose of the Act of Congress cannot be otherwise accomplished. Certainly it will not be contended that the bringing of an action by respondent in the Eastern District of New York, which is the point farthest removed where suit could be brought, is essential to the accomplishment of the purposes of the act.

The right to bring an action in a distant district under section 6 of the Federal Employers' Liability Act is no more sacred than that established by the Federal Constitution to sue in any State, the same as citizens of that State. If, when the distant action be under the circumstances inequitable, prosecution of the latter can be enjoined, so should the prosecution of the former. That a Federal statute confers the right to sue in a Federal Court does not prevent another court from enjoining the plaintiff in a suit brought pursuant to that statute from further prosecution thereof when such prosecution is inequitable. No attack was made below on the jurisdiction of the District Court in the Eastern District of New York, nor on its process, nor is any made now, nor any attempt to interfere with any action of that court. It was only sought to compel a citizen of Ohio to conduct himself in accordance with the laws of Ohio, and refrain from prosecuting harassing and vexatious litigation, since he had abundant opportunity of litigating his cause of action without such harassment and vexation. That conduct was determinable by the laws of Ohio and the Supreme Court of Ohio erred in setting aside its own judgment in that respect due to a mistaken construction of the Federal Act, and of the decisions of the Federal Courts.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers, in order that the Respondent may be enjoined from his inequitable conduct and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of Ohio and finally reverse it.

MORISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

WAITE, SCHINDEL & BAYLESS,
Attorneys for Petitioner.

(1898)

Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER

REPLY BRIEF OF PETITIONER

MORRISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner

THE LAWYERS & BRIEF CO., LAW PRINTERS
CINCINNATI, OHIO

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REPLY BRIEF OF PETITIONER

In relying on the case of *C. & O. Ry. Co.* v. *Vigor*, 302 U. S. 705, 82 L. Ed. 545, 58 S. C. R. 25, in which this court denied petition for certiorari to the United States Circuit Court of Appeals (6th Cir.) to sustain respondent's contention that this court has decided the matters involved in the instant case, respondent ignores the definite finding of the Sixth Circuit Court of Appeals that there were insufficient facts proven to warrant the granting of equitable relief. At page 8 the court said:

> "We find no fact alleged in the bill or set forth in the supporting affidavits that would justify us in saying

> that the trial of the cause in the Indiana court would cast an unreasonable burden on the plaintiff or would give to the defendant an inequitable advantage."

The denial of certiorari is not a decision on the points of law involved and since the lower court held that there were insufficient facts, this court can be presumed to have held that it would not weigh the evidence. No further presumption is warranted. In the instant case the Supreme Court of Ohio specifically held that the facts warranted the granting of equitable relief under the law of Ohio, but held that the Federal Employers' Liability Act, 45 U. S. C. 56, 36 Stat. 291, barred the courts of Ohio from granting that equitable relief which they would otherwise have granted.

Thus the question stated on pages 21 and 22 of petitioner's brief is squarely raised for a decision by this court. We submit that this court has never decided the exact point, as to whether or not Sec. 6 of the Federal Employers' Liability Act, without expressly prohibiting does prohibit state courts from exercising inherent equitable powers to prevent citizens under such state court's jurisdiction from bringing suits in foreign jurisdictions which would inequitably harass and vex the employer and which would be contrary to the best interests of justice. Respondent does not and cannot point out any express prohibition against such inherent equitable powers and by broad sweeping statements of general propositions of law, attempts to show that such prohibition is contained in the Act by implication.

Respondent cites many cases wherein was presented and decided only the question of the jurisdiction of the court to determine a case brought pursuant to a federal statute. That is a different question from that now presented to the court, which relates not to the jurisdiction of the District Court of the United States for the Eastern District of New York, but to the power in a state court to prevent by

injunction an unjust harassment of a defendant by a plaintiff a citizen of the jurisdiction of the court. The injunction would not interfere with the right granted by said Section 6 to bring his action in the district where the defendant was doing business. It would only confine him to the district or districts in which the defendant was doing business and in which the cause could be tried without unjust harassment. It is important that Congress did not use the words "any district." By avoiding such use it left unhampered the well known equitable jurisdiction over the plaintiff to prevent inequitable choice of a place of trial.

It is apparent from the many cases cited in both petitioner's and respondent's briefs that these questions have troubled the courts considerably, and petitioner submits that this question should be finally determined by this court so that the employee may not now do what the law prior to the amendment of Section 6 permitted the employer to do, to-wit, harass and vex the employee by requiring him to go great distances far removed from the scene of the accident and the residence of all of the witnesses to try his case, if he wished to resort to a Federal Court.

Petitioner cited *Bryant* v. *Atlantic Coast Line Ry. Co.*, 92 F. (2d) 569 (C. C. A. 2) for the proposition that the Second Circuit had ruled that the state court had equitable jurisdiction over its citizens to prevent harassment, notwithstanding the provisions of Section 6 of the Federal Employers' Liability Act.

Our attention has just been called to a decision by the 8th Circuit Court of Appeals in the case of *Southern Railway Company, appellant*, v. *Ethel Painter, Admx.-appellee*, decided January 10, 1941, in which that court considered an identical situation to that raised in the Bryant case, discussed the Bryant case and held directly contrary to the Bryant case, sustaining an injunction against the railroad granted by the District Court in which the action was filed

by the employee and which enjoined the railroad from further proceeding with an injunction granted in its suit against the employer by a state court in Tennessee.

We are advised that counsel for the Southern Railway will have their petition for certiorari and brief filed in this court sometime next week. We mention this to show that litigation on this point continues and will continue until the matter is finally disposed of by this court.

It seems unnecessary for us to answer the next to the last paragraph of respondent's brief (p. 23) in which counsel charge petitioner with causing all the harassment and vexation in this case, particularly in view of the definite holding by the Supreme Court of Ohio that the equities favor petitioner's position, but that the Supreme Court of Ohio is barred from giving relief because of the statute. If that court had denied the equities to be in the petitioner as did the Sixth Circuit Court of Appeals in the Vigor case, supra, then respondent might have had a complaint. We submit that the record shows no mere effort on the part of petitioner to cause delay, but a sincere effort to establish a principle that should be established and which is necessary to prevent the inequitable conduct of this respondent and other plaintiffs. Petitioner's efforts were occasioned solely by the inequitable action of respondent and his counsel in selecting the jurisdiction farthest removed from respondent's residence and the location of the witnesses that could be selected wherein the petitioner was doing business. The respondent cannot obscure his inequity by attempting to throw the blame on his victim who endeavors as best it knows how to escape the wholly unjust consequences of respondent's conduct.

Even since the filing of the petition and the supporting brief herein the pressure on the transportation facilities of the railroads has measurably increased. The necessity of conserving man power for duties essential to the defense

program makes it increasingly important that the time and energies of the employees of the railroads of this country be not needlessly expended in attending the trial of cases many hundreds of miles distant from the place of their duties. A decision by this court of this petition favorable to the petitioner would be in the interest of the national economy, and, we submit, in harmony with the Act of Congress, as well as in harmony with the views of this court at the time of a prior emergency in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 315, where Mr. Justice Brandeis said:

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

We therefore respectfully submit that the petition for certiorari should be granted.

Morison R. Waite,
William A. Eggers,
Philip J. Schneider,
Counsel for Petitioner.

January 30, 1941.

FILED SEP 17
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

BRIEF FOR THE PETITIONER ON THE MERITS

MORISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Cincinnati, Ohio,

HARRY H. BYRER,
Baltimore, Md.,
Counsel for Petitioner.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio.
Attorneys for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

BRIEF FOR THE PETITIONER ON THE MERITS

The first brief in support of the petition was prepared in some haste due to the limitation of time prescribed by the Supreme Court of Ohio in its stay order of December 20, 1940 (R. 37). It is felt that counsel may be somewhat more helpful to the court by a re-writing of that brief with reference to other authorities, some of which are decisions rendered since that brief was prepared, and which it is submitted support the contentions of the petitioner.

This brief seeks to reverse the judgment of the Supreme Court of Ohio denying the petitioner's application for an injunction to restrain the respondent from prosecuting a suit under the Federal Employers' Liability Act, in a Fed-

eral District Court in the Eastern District of New York. The court sustained the contention of the respondent and based its denial solely because Section 6 of that Act prevented it from granting an injunction that otherwise would have been granted.

The opinion below is *The Baltimore & Ohio Railroad Company, Appellant*, v. *Kepner, Appellee*, 137 Ohio St. 409, 30 N. E. (2d) 982, decided December 18, 1940, on Rehearing (R. 23).

STATEMENT OF THE CASE

The facts alleged in the petition for injunction (R. 1-5) admitted by the demurrer, and assumed by the Ohio Supreme Court to support your petitioner's contention, and substantiated by affidavits (R. 15-22), are these:

Respondent was at the time of the accident and since has been a resident of Hamilton County, Ohio (R. 1, 18). He was employed by your petitioner and was injured on May 18, 1939, while so employed at East Middletown, Butler County, Ohio, immediately adjoining Hamilton County to the north (R. 1, 18). Petitioner operates lines of railroad in both counties and has numerous agents in each upon whom service can be made (R. 1, 18).

No suit has been filed by the respondent for his injuries in Hamilton or Butler Counties or in the United States District Court for the Southern District of Ohio, all of which courts are in constant session (R. 1, 2).

Respondent employed Morris S. Borden and Samuel T. Gaines, attorneys of Cleveland, Ohio, to represent him, each of whom are engaged in general practice of law in Cleveland, and respondent failed to avail himself of the courts immediately available and within a reasonable distance of the residence of any and all of the witnesses necessary for the trial, but by agreement and conspiracy among respondent and his counsel proceeded to file suit in the United

States District Court for the Eastern District of New York (R. 2).

Edward M. Ballard and George Metzger, attorneys on Respondent's brief, are not counsel of record in said suit filed in the Eastern District of New York (R. 7) and appeared for Respondent only after the petition for injunction was filed in the Common Pleas Court of Hamilton County, Ohio (R. 7).

To maintain its defense, petitioner will have to transport not less than twenty-five witnesses (R. 2, 3, 16), all of whom reside in Hamilton or Butler Counties, Ohio, a distance of over seven hundred miles (R. 2). These witnesses consist of the employees of petitioner, numerous physicians, surgeons, radiologists, hospital attendants and others who gave him medical attention and numerous other non-employee witnesses as to various essential elements (R. 2, 3).

The medical witnesses are highly important because the nature and extent of Respondent's injuries are seriously disputed. All of the others are important because liability is disputed (R. 3, 19).

Petitioner would be totally deprived of its legal right of process to force the attendance of witnesses in the United States District Court, Eastern District of New York (R. 3), and they could not be compelled to attend a trial in New York and such as would consent to do so would have to be transported and maintained during the trial at great expense, which would be exceedingly heavy as to the medical experts. This expense would exceed by $4,000 the cost of the trial of the same issues in a court located near the residence of respondent (R. 3). The employee witnesses are engaged in interstate train service.

It is impossible to anticipate all of the witnesses that might be necessary and get them to the trial if needed (R. 4, 16, 17, 19). The presentation of testimony by depo-

sitions cannot effectively present to the court and jury the facts involved, petitioner being deprived of the right of presenting the witnesses in person, and rebuttal evidence would be impossible of procurement and submission (R. 4, 16, 17, 19).

Trials in the United States District Court, Eastern District of New York, are assigned in numerical order and it is impossible to tell the exact day the case will start (R. 3, 16). Therefore, it would be necessary to have the witnesses in New York a number of days prior to the probable date of trial because of the long distance involved (R. 3, 16). When the case is called for trial both parties must be ready to proceed forthwith.

Respondent conspired with his attorneys of Cleveland, Ohio, to bring the action at a distant point for the purpose of annoying, harassing and vexing the petitioner without a sound and proper purpose of reasonably prosecuting any right of action that respondent had against the petitioner (R. 3), and the continued prosecution of the action in New York would constitute an undue burden on interstate commerce and would be an unreasonable, improper and inequitable burden upon the petitioner, and such unreasonable and inequitable proceeding would result in no benefit to the respondent (R. 4).

All of the foregoing facts were admitted by the demurrer of respondent to be true.

The Court of Common Pleas of Hamilton County, Ohio, sustained a demurrer to the petition on the ground that the injunction prayed for would be in contravention of a right granted by the Federal Employers' Liability Act, as amended, Title 45 U. S. C., Sec. 56 (36 Stat. 291) (R. 11, 12). A copy of the Opinion of the court is Appendix A to the Petition for Certiorari herein, page 11.

On appeal to the Court of Appeals of the First Appellate District of Ohio, that court did, from the bench, dismiss the

petition and deny an injunction (R. 13), and that determination being in conflict with a judgment by the Court of Appeals of the Second Appellate District pursuant to Article IV, Section 6 of the Constitution of the State of Ohio did thereupon certify said cause to the Supreme Court of Ohio. There were two arguments in that court. On the first argument the court evenly divided. [*The Baltimore and Ohio R. R. Co., Appellant* v. *Frederick S. Kepner, Appellee*, 137 O. S. 206, 28 N. E. (2d) 586] (R. 35). Thereafter, the court on October 2, 1940, granted a rehearing (R. 37) and after reargument said court again affirmed the judgment below in an opinion rendered December 18, 1940. [137 O. S. 409, 30 N. E. (2d) 982.] On December 20th that court granted the petitioner a stay and injunction order (R. 37).

The Supreme Court of Ohio assumed that the equities alleged and admitted by demurrer were sufficiently great to warrant the granting of an injunction except that the Federal Employers' Liability Act barred the Ohio State courts from issuing an injunction against its citizens from proceeding in any Federal District Court, in which district the defendant shall be doing business.

It was the contention of your petitioner that Congress did not expressly prohibit a court of a state from exercising its equitable jurisdiction over its citizens, that Congress merely gave the employee the right to sue concurrently in a state or federal court where the employer was doing business, that Congress could be presumed to have known that a court of equity had jurisdiction to prevent citizens of its jurisdiction from unjustly harassing and oppressing others by bringing suits at a point farthest away from the residence of the employee and the situs of the accident and that as Congress did not expressly prohibit such equitable action a State court could restrain citizens of that state from such harassment in accordance with the well-founded principles of equitable jurisprudence.

The Supreme Court of Ohio by its said opinion rejected these contentions holding that Section 6 of the Federal Employers' Liability Act gave the injured employee the privilege of bringing his action in the District Court in any district, however remote, in which the defendant was doing business, when sued, and that the courts were without power to prevent his arbitrary and unreasonable choice of the farthest district from the scene of the accident and residence of the plaintiff, no matter how inequitable such choice might be.

SPECIFICATION OF ERRORS

Your petitioner submits that the Supreme Court of the State of Ohio was in error in the following respects:

1. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals and of the Court of Common Pleas, and in not reversing the Court of Appeals and the Court of Common Pleas.

2. The Supreme Court of Ohio erred in failing to enjoin permanently the Respondent from prosecuting his suit pending in the United States District Court for the Eastern District of New York.

3. The Supreme Court of Ohio erred in its interpretation of the Federal Employers' Liability Act.

4. The Supreme Court of Ohio erred in construing the Federal Employers' Liability Act as preventing the courts of Ohio from enjoining a citizen of that state within the court's jurisdiction from prosecuting an action under that Act in a Federal court so distant, and under such circumstances, as under the law of Ohio constituted vexatious, harassing, inequitable conduct subject to injunction.

5. The Supreme Court of Ohio erred in holding that the question involved was one of denying or interfering with the jurisdiction of the Federal courts.

6. The Supreme Court of Ohio erred in not applying the law of Ohio in determining what conduct of its own citizen

was inequitable and subject to the injunctive power of the courts of that State.

SUMMARY OF ARGUMENT

I.

Courts of equity have inherent power to restrain the prosecution of vexatious and harassing litigation, and it is the law of Ohio that its citizens are subject to the exercise of such power by its courts.

Pomeroy's Equity Jurisprudence (3rd Ed., Vol. 4, Sec. 1360) (Vol. 6, Sec. 670);
Snook v. *Snetzer*, 25 Ohio St. 516;
N. Y. C. & St. L. R. R. Co. v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349;
Cole v. *Cunningham*, 133 U. S. 107;
Dehon v. *Foster*, 4 Allen 545 (Mass.);
Steelman v. *All Continent Corp.*, 301 U. S. 278, 291;
Boston & M. R. R. v. *Whitehead*, 29 N. E. 2nd 916 (and cases cited).

II.

The Federal Employers' Liability Act neither expressly nor by implication forbids this exercise of power by the courts, nor does it so completely cover the field as to preclude the application of state law.

Douglas v. *N. Y., H. & N. H. R. Co.*, 279 U. S. 377;
See list of cases, brief pages 13, 14.
Maurer et al. v. *Hamilton et al.*, 309 U. S. 598.
Reid v. *Colorado*, 187 U. S. 137, 148.
Federal Trade Commission v. *Bunte Bros.*, U. S. , 61 S. C. R. 580, 582.
United States v. *F. W. Darby Lumber Co.*, U. S. , 61 S. C. R. 451, 459.
Hines v. *Davidowitz*, U. S. , 61 S. C. R. 399, 410;
Kelly v. *Washington*, 302 U. S. 1;
Michigan Cent. R. R. Co. v. *Mix*, 278 U. S. 492, 73 L. Ed. 470.

III.

The history of the amendment to Section 6 of the Federal Employers' Liability Act demonstrates that Congress did not intend to bar the equitable power of courts to restrain the prosecution of vexatious and harassing litigation, and that the exercise of such power would be in harmony with the purpose of the act.

Palmer v. *Webster & Atlas Bank of Boston*, U. S. , 61 S. C. R. 542, 545.
Thornton's Federal Employers' Liability Act, Third Edition, Appendix B at page 576, 580.
Congressional Record 45, Part 4, page 4040.

IV.

The restraint of a party to a suit is not tantamount to the restraint of the court itself.

Steelman v. *All Continent Corp.*, 301 U. S. 278, 290;
Brant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569.

V.

The facts in the present case are sufficient to invoke the equitable powers of a court.

B. & O. Rd. Co. v. *Kepner*, 137 Ohio St. 409 (R. 23).
Davis, Director General v. *Farmers' Cooperative Co.*, 262 U. S. 312.
Michigan Central R. R. Co. v. *Mix*, 278 U. S. 492.
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284.
N. Y. C. & St. L. Rd. Co. v. *Matzinger*, 136 Ohio St. 271.
Erie R. Co. v. *Tompkins*, 304 U. S. 64.

VI

The weight of authority supports the right to injunction and the Supreme Court of Ohio erred in holding otherwise.

Reed's Admrx. v. *Illinois Central R. R. Co.*, 182 Kentucky 455, 206 S. W. 794.

See numerous other state cases at page 27 of brief.
Ex Parte Crandall, 53 F. (2d) 969 (C. C. A. 7), c. d. 285 U. S. 540.
Bryant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569.

VII.

The authorities relied upon by the Supreme Court of Ohio and the Respondent do not support the judgment of the court below.

[redacted]

VIII.

Whether the conduct of an Ohio citizen is equitable is a question of law, which an Ohio court having jurisdiction of the citizen is to determine in accordance with that law unless Congress within its delegated powers has made an enactment inconsistent with the Ohio law.

Millikin v. *Meyer*, U. S. , 61 S. C. R. 339.

STATEMENT OF THE QUESTIONS INVOLVED

The rule of the Supreme Court of Ohio is that the syllabus which is by the court states the law of the case, 136 O. S. Rules of Practice, Page LXXII, Rule VI. It is to be read in the light of the facts as stated in the opinion. Rule VI. See also *The B. & O. Rd. Co.* v. *Baillie*, 112 Ohio St. 567, Syl. 2. The syllabus of the opinion below reads:

> "The State courts of this State cannot, in the exercise of their equity powers, enjoin a resident of the State from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a Federal Court of another State having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this State, and even though its prosecution in the Federal Court of another State may cause great inconvenience and expense to the defendant."

Your petitioner contended below that there is nothing in the Federal Act to prevent a State court from enjoining a citizen of that State from prosecuting an action under the Federal Act, whether in a State or Federal Court, where that prosecution would, under the circumstances, be inequitable, harassing, vexatious and contrary to the best interests of justice. And that the venue provisions of Section 6 of the statutes did not permit the employee to exercise his right of choice between the various jurisdictions available to him in an inequitable manner.

The respondent contended that under the Federal Act he could not be restrained from such prosecution in any Federal District Court in whose district the railroad did business, even though such prosecution would be in violation of the equitable principle just referred to.

It is submitted that the Ohio Courts erred in sustaining respondent's contention.

ARGUMENT

I. Courts of Equity Have Inherent Power to Restrain the Prosecution of Vexatious and Harassing Litigation, and It Is the Law of Ohio That Its Citizens Are Subject to the Exercise of Such Power by Its Courts

This power, we submit, is inherent in all Courts, State as well as Federal. The author in *Pomeroy's Equity Jurisprudence* (3rd Ed. Vol. 4, Sec. 1360) says:

> "The use of injunctions to stay actions at law was coeval with the establishment of chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction."

In *Snook* v. *Snetzer*, 25 Ohio St. 516, the court enjoined a citizen from prosecuting an attachment in West Virginia

against another Ohio citizen whose earnings were exempt in Ohio but not in West Virginia.

In *N. Y. C. & St. L. R. R. Co.* v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349, the syllabus, by the court, reads:

> "A Court of equity may restrain a person over whom it has jurisdiction from bringing or maintaining in a foreign State an action for the purpose or with the effect or unduly harassing or oppressing the defendant, or securing to the plaintiff some unfair, unconscionable or inequitable advantage."

Snook v. *Snetzer, supra*, was cited with approval by this court in *Cole* v. *Cunningham*, 133 U. S. 107, an authority recognized throughout the decisions bearing upon the equitable principle involved. In *Cole* v. *Cunningham*, this court followed *Dehon* v. *Foster*, 4 Allen 545 (Mass.), and at the middle of page 124 said:

> "*Dehon* v. *Foster*, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, C. J., points out that the jurisdiction of a Court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon a proper case made, either in the Courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in Courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that, as the decree of the Court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

Cole v. *Cunningham* was last cited by this court in 1936, in *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 291.

In a recent case decided by the Supreme Court of Massachusetts, *Boston & M. R. R.* v. *Whitehead*, 29 N. E. (2d) 916, at 917:

"There is no doubt that where a sufficient equity is shown courts of this Commonwealth have the same power to enjoin persons subject to their control from prosecuting suits in other States that they have to enjoin them from prosecuting suits in this Commonwealth. *Dehon* v. *Foster*, 4 Allen, 544, 550; *Cunningham* v. *Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am.Rep. 657; *Carson* v. *Dunham*, 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 202, 14 Am. St. Rep. 397; *Columbian National Life Ins. Co.* v. *Cross*, 298 Mass. 47, 52, 9 N. E. (2d) 402; *Lydia E. Pinkham Medicine Co.* v. *Gove*, 298 Mass. 53, 66, 9 N. E. (2d) 573; *Cole* v. *Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538."

In that case the facts show that the suit was brought under the Federal Employers' Liability Act but that the place of bringing the suit, though in a foreign state, was only ninety-one miles from the scene of the accident and the court held that there was not a sufficient equity showing to warrant the granting of an injunction.

II. The Federal Employers' Liability Act Neither Expressly nor by Implication Forbids This Exercise of Power by the Courts, nor Does It so Completely Cover the Field as to Preclude the Application of State Law

There is nothing in the Act expressly prohibiting the exercise by the State Courts of their equity powers in a matter of this kind. There have been numerous cases decided by this court and the courts of last resort of various states where the contention has been made that the Federal Employers' Liability Act was complete and all-inclusive and that the state courts had no right to interpose interpretations which would conform to the practice in such state. The following list of cases shows that the Act has not been held to be all-inclusive and complete in itself and that there are many ways that the state can act and follow its law under the Federal Act.

In *Douglas* v. *N. Y., H. & N. H. R. Co.*, 279 U. S. 377, the question was as to the right of a Connecticut citizen, where the accident happened in Connecticut, suing under the Federal Act in a New York state court, a Connecticut corporation, doing business in New York. This court invoked a New York statute that authorized the state courts to dismiss the action. The last paragraph of the opinion, page 387, reads:

> "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57."

A State Court may order a conditional remittitur of damages. *Roy* v. *Oregon S. L. R. Co.*, 55 Idaho 404, 42 Pac. (2d) 476, c. d. 296 U. S. 579.

States retain full control over administrators and executors appointed by its Courts. *Spoo* v. *C. R. I. & P. Ry. Co.*, 191 Iowa 1134, 183 N. W. 850.

State procedure is sustained even though perjury of witnesses is proved. *Taylor* v. *C. C. C. & St. L. Rd. Co.*, Mo. , 63 S. W. (2d) 69, c. d., 290 U. S. 695.

The states may say whether the jury shall be unanimous or whether nine or less may return a verdict. *M. & St. L. R. R. Co.* v. *Bombolis*, 241 U. S. 211.

The states may decide who are the next of kin. *S. A. L. Ry.* v. *Kenney*, 240 U. S. 489.

The states may decide who is a beneficiary. *M. & S. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66.

The states may determine the rate of interest on judgments. *N. Y., N. H. & H. R. R. Co.* v. *Murmann*, 253 N. Y. S. 450, c. d. 288 U. S. 601.

The states may decide what constitutes service of summons. *Klinge* v. *So. Pac. Co.*, 65 F. (2d) 85, c. d. 290 U. S. 657.

The states may decide these cases under the state rules of pleading. *Williams* v. *St. L. & S. F. RR. Co.*, 85 S. W. (2d) 624, Mo.

An award under a state compensation law is a bar to a judgment in a suit under the Act. *C. R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611.

The state may prohibit a suit under the Act jointly against a railroad and a fellow employee. *Lee* v. *Cent. of Ga. Ry. Co.*, 252 U. S. 109.

A state venue statute was sustained in an action under the Federal Act. *Loftus* v. *Penn. R. Co.*, 107 Ohio St. 352; *Doll* v. *C. Y. W. Ry. Co.*, 159 Minn. 323, 198 N. W. 1006.

A state statute for a lien for an attorney's fee held good in an action under the Act. *Dickinson* v. *Stiles*, 246 U. S. 631.

A state statute providing a penalty for a frivolous appeal was sustained. *L. & N. R. Co.* v. *Stewart*, 241 U. S. 261.

Employees always had a right to sue a railroad for negligence. When Congress passed the Statute it knew that the courts had inherent power to enjoin citizens from maintaining harassing litigation. In *Maurer et al.* v. *Hamilton et al.*, 309 U. S. 598, this court, top of page 614, said:

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

The same principle was expressed by Mr. Justice Harlan in *Reid* v. *Colorado*, 187 U. S. 137, 148:

". . . It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243."

The controversy in this case relates solely to the effect of the Amendment made April 5, 1910, to Section 6 of the Federal Employers' Liability Act, in these words:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291, 45 U. S. C. Section 56.)

The question is, did Congress by this language take away from the state courts having jurisdiction over a claimant under the act resident in the jurisdiction of that court, the power to enjoin him from prosecuting his claim in a distant federal court, when such action is so brought for the purpose of inequitably harassing and vexing the defendant, which power of injunction is a recognized power in the state court under law of the state of claimant's residence.

This court has within the last few months had several occasions to determine the question of whether federal

power granted under acts of Congress excluded powers of a state. As said by Mr. Justice Frankfurter in *Federal Trade Commission* v. *Bunte Bros.*, U. S. , 61 S. C. R. 580, 582:

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. . . . the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in Sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated."

And as said by Mr. Justice Stone in *United States* v. *F. W. Darby Lumber Co.*, U. S. , 61 S. C. R. 451, 459:

> "In the absence of congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce."

Mr. Justice Stone also said in his dissenting opinion in *Hines* v. *Davidowitz*, U. S. , 61 S. C. R. 399, 410:

> "Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history."

Mr. Justice Black in the same case, in rendering the opinion for the court said, at page 404:

> "Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In *Kelly* v. *Washington*, 302 U. S. 1, Mr. Chief Justice Hughes at page 10 said:

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

We contend that there is nothing in the Act to show that Congress intended to nullify the equity powers of the state courts in cases arising under the Act.

Congress, as much as the courts, must have realized that the broad venue provisions of the act might result in inequitable use of such provisions and have left the courts unfettered to prevent by injunction such inequitable action.

The injunction would not have deprived the respondent of any right specifically granted by the Act. It reads, "An action may be brought in a District Court of the United States in the district . . . in which the defendant shall be doing business at the time of commencing such action." Notwithstanding the injunction he still could sue in the district in which the defendant shall be doing business convenient for him and all parties. The statute does not say he can sue in any district in which the defendant shall be doing business, although the Supreme Court of Ohio and

other courts have erroneously assumed that Congress intended "the district" to mean "any district."

This court prohibits actions under the Act in state courts if the business in that jurisdiction of the defendant is only the maintenance of an office for solicitation where the prosecution thereof would burden interstate commerce and no reason is apparent for a distinction were the selected tribunal a federal district court. *Michigan Cent. R. R. Co.* v. *Mix*, 278 U. S. 492, 73 L. Ed. 470.

III. The History of the Amendment to Section 6 of the Federal Employers' Liability Act Demonstrates That Congress Did Not Intend to Bar the Equitable Power of Courts to Restrain the Prosecution of Vexatious and Harassing Litigation, and That the Exercise of Such Power Would Be in Harmony with the Purpose of the Act

The history of the Act demonstrates that Congress did not intend to bar the equitable remedy now contended for, and that such remedy would be in harmony with the purpose of the Act. The history and purposes of the Act (28 U. S. C., Section 56) are clearly shown in the Committee reports in support of the bill. To such reports this court frequently resorts to determine the purposes of legislation:

Palmer v. *Webster & Atlas Bank of Boston*, U. S. , 61 S. C. R. 542, 545;
United States v. *Gilliland*, U. S. , 61 S. C. R. 518, 522;
Helvering v. *Hutchings*, U. S. , U. S. Law Week March 4, 1941, page 4233;
United States v. *Pelzer*, U. S. , U. S. Law Week March 4, 1941, page 4235.

The Federal Employers' Liability Act as adopted in 1908 was subject to the limitations of Section 51 of the Judicial Code requiring an action in a federal court founded on a federal statute, to be brought in the district of which the claimant was an inhabitant, and in Connecticut it was held

that the Act could only be enforced in the federal courts, and did not apply to actions brought in a state court. The reasons for the amendment are fully stated in the Senate Report, March 22, 1910, to accompany H. R. 17263, submitted by Mr. Borah from Committee on Judiciary. It is printed as Appendix B in Thornton's Federal Employers' Liability Act, Third Edition, at page 576. At page 580 is quoted that part of President Taft's message of January 7, 1910, relating to the necessity of amendment. With respect to the place where suit could be brought he said:

> "The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any place other than that of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law."

Following the quotation from the President's message, the report of the committee continues, as follows:

> "AMENDMENT AS TO JURISDICTION—PLACE WHERE SUIT MAY BE BROUGHT.
>
> This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.'
>
> This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was

> issued. This may be at a place in a distant State from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned.
>
> The extreme difficulty, if not impossibility, of a poor man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances.
>
> * * * * *
>
> No argument is necessary to convince that this is a grave injustice to the plaintiff.
>
> Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a Federal court on a right based on the law of the United States.
>
> But to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting this case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist."

The report is found in Congressional Record No. 45, Part 4, Page 4040. The quotation from President Taft's special message is found in the second column of page 4041.

It is seen that the whole purpose of the amendment was to enable the plaintiff-employee to bring his suit at a place convenient for him. In the language of President Taft, his right "should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws." Manifestly, there was no intention to secure to the claimant a right to do that which constituted the injury against which he was being protected uncircumscribed by the equitable jurisdiction to restrain an inequitable exercise of a

legal right. The intention was to give him the same, and no greater, right than the ordinary litigant who is not allowed to exercise his rights in an inequitable manner. He could bring his action in a state or federal court where, because of the doing business by the defendant railroad, service could be had. But there was no declaration by Congress that he had a right to bring his action in every such court. The power to restrain the inequitable election of courts was not interfered with, either explicitly or by implication.

Certainly it cannot be said that the application to this case of the principle of law established in Ohio, of enjoining an inequitable and harassing prosecution of a suit for damages in a distant court, would, in the language of Mr. Justice Black "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, *supra*.

IV. The Restraint of a Party to a Suit Is Not Tantamount to the Restraint of the Court Itself

It is not and never has been contended by the Petitioner that an injunction by the Supreme Court of Ohio would in any way interfere with or impair the jurisdiction of the District Court of the United States for the Eastern District of New York. The action was only to enjoin the respondent, who is a citizen of Ohio and subject to the jurisdiction of the Common Pleas Court of Hamilton County, Ohio, on the ground that he was using a legal process in an inequitable, unconscionable and vexatious manner by proceeding with his action brought in that distant court. The language of Mr. Justice Cardozo in *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 290, is appropriate. He said, omitting citations:

> "The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdic-

> tion be taken in its strict and proper sense. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. Suits as well as transfers may be the protective coverings of fraud. We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

Judge Learned Hand, for the Circuit Court of Appeals, Second Circuit, in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, at page 571, near the end of the second column said:

> "For the Virginia suit was based upon the notion that plaintiff was using inequitably a legal right—the right of action under the Federal Employers' Liability Act—just as he might use the legal title to land inequitably."

We submit that Congress did not grant the employee a Federal right to do an inequitable thing and one which equity would enjoin but for the Act. The granting of an injunction by Ohio courts would not deny the respondent a Federal right because Congress has not given a right to bring an inequitable action. To express it differently, Congress has not attempted either expressly or by implication to deprive the State courts of their jurisdiction in equity. The State of Ohio is a sovereignty having inherent rights to control its citizens from maintaining unjustly harassing and vexatious litigation. That inherent right was not ex-

pressly denied in the Federal Act and unless expressly denied the statute must be strictly construed against a denial of such right by implication.

V. The Facts in the Present Case Are Sufficient to Invoke the Equitable Powers of a Court

This court is familiar with the serious burden on interstate commerce from the prosecution of tort cases in remote jurisdictions. *Davis, Director General* v. *Farmers' Cooperative Co.*, 262 U. S. 312; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492. It is held that such burden to interstate commerce bars the prosecution of such suits. In *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, the Court held that such burden on interstate commerce is not a bar to the prosecution of an action under the Federal Employers' Liability Act in a jurisdiction where the defendant railroad owns and operates railroad lines. There is presented in this case something more than mere burden on interstate commerce. It is alleged that the Ohio plaintiff, Kepner, and his Ohio counsel conspired to bring his action in the Eastern District of New York for the purpose of annoying, harassing and vexing petitioner herein, the railroad company, without a sound and proper purpose of reasonably prosecuting any right of action that Kepner may have against the railroad company. Brooklyn, New York, where the action is pending, is eight hundred miles from the scene of the accident and seven hundred seventy-five miles from the residence of Kepner. The railroad company has twenty-five witnesses, all in Hamilton and Butler Counties, Ohio, none of whom are subject to subpoena in the pending action. It has never been claimed that Kepner has any witnesses other than those in Ohio. It is impossible to ascertain in this District Court a definite time of trial and it would be necessary to be ready for trial and the railroad company have its numerous witnesses in New York several

days before the probable date of trial and to be maintained there for all of the said period, in addition to the time necessary for the trial itself, and the actual cost would exceed that in a jurisdiction adjacent to the accident or residence of Kepner by at least $4,000.

The inequity in this prosecution exceeds the inequity in the case of *N. Y. C. & St. L. Rd. Co.* v. *Matzinger*, 136 Ohio St. 271, and that in *Denver & R. G. W. R. Co.* v. *Terte*, *supra*. This court will take judicial notice, as did the Ohio Supreme Court in the *Matzinger* case, of the fact that the presentation of evidence by deposition is unsatisfactory and also of the fact that it is obvious that rebuttal evidence would be impossible of procurement and submission. Where there is a large number of physicians and surgeons, as is the case herein, a more than usual amount of expense and annoyance is involved especially where such witnesses have to travel a long distance and be maintained a long and extended period of time awaiting opportunity to testify. It might, indeed, be impossible to get them to leave their patients to so testify.

The Ohio courts below were asked to regulate the conduct of an Ohio citizen in accordance with the law of the State as declared by its Supreme Court governing his action with respect to the prosecution of actions of this character. What constitutes proper conduct of a citizen of Ohio is determinable by the laws of Ohio. The Supreme Court of Ohio below (R. 25) said:

> "We may, therefore, assume that the equities shown by the petition favor the contention of the plaintiff and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action."

This court has pointed out in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, that the law of a State is that contained in the decisions of its courts as well as in its statutes and that the

laws of the State are as binding on the Federal courts as on the State courts.

When one considers the tremendous amount of litigation that goes on under the Federal Employers' Liability Act and the possibility of the tremendous increase in the cost both of time and money in such litigation if it be the law that the plaintiffs therein may resort to the District Court of the United States having jurisdiction farthest removed from the plaintiff's residence and the scene of the accident, it must be concluded that there be in the courts an adequate remedy to prevent such abuse of the mere right of venue.

If, as the court said in the *Davis* v. *Farmers Cooperative Co.* case, *supra*, suits against carriers, especially at far distant points, is an undue burden on interstate carriers, then it is all the more a burden and an harassment to have railroad employees at the present time carried far distances, as here, and kept from their work for a long and indefinite period attending the trial, when they should be at work assisting transportation due to the emergency confronting the country today, as is evidenced by the numerous recent enactments of Congress, of which, we submit, the court must take judicial notice.

Even since the filing of the petition and the supporting brief herein the pressure on the transportation facilities of the railroads has measurably increased. The necessity of conserving man power for duties essential to the defense program makes it increasingly important that the time and energies of the employees of the railroads of this country be not needlessly expended in attending the trial of cases many hundreds of miles distant from the place of their duties. A decision by this court of this petition favorable to the petitioner would be in the interest of the national economy, and, we submit, in harmony with the Act of Congress, as well as in harmony with the views of this court at the time of a prior emergency in *Davis* v. *Farmers Co-*

operative Co., 262 U. S. 312, 315, where Mr. Justice Brandeis said:

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

VI. The Weight of Authority Supports the Right to Injunction and the Supreme Court of Ohio Erred in Holding Otherwise

Injunctions against the prosecution of inequitable and harassing actions under the Federal Employers' Liability Act in distant State courts have been often sustained by the decisions of the highest courts of the State.

Reed's Admrx. v. Illinois Central R. R. Co., 182 Kentucky 455, 206 S. W. 794.

At page 464, Judge Carrol for that court said:

> "We do not, however, give to this statute the preemptory effect claimed for it by counsel for the administratrix or agree with their contention that, as it was allowable under the act to bring this suit in the State of Minnesota, therefore the plaintiff could not be restrained by injunctive process from prosecuting it to a conclusion in that state. . . .
>
> "The Federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience."

Louisville & Nashville R. Co. v. *Ragan*, 172 Tenn. 593, 113 S. W. 743.

Kern v. *C. C. C. & St. L. Ry. Co.*, 204 Indiana 595, 185 N. E. 446.

Missouri ex rel. N. Y. C. & St. L. R. R. Co. v. *Nortoni*, 331 Missouri 764, 55 S. W. (2d) 272.

See also:

Chicago, M. & St. P. R. R. Co. v. *McGinley*, 175 Wis. 565, 185 N. W. 218.

It was there said at the bottom of page 220:

> "There is nothing in the Federal Employers' Liability Act as amended, which is indicative of an intent on the part of Congress to prohibit a court of equity from so regulating the conduct of its own citizens by an injunction, as to prevent hardship, oppression, or fraud, and if prior to the passage of such Employers' Liability Act, the power existed in a court to grant relief by injunction as indicated, such power continued to exist and now exists."

New York, C. & St. L. R. R. Co. v. *Perdue*, 97 Ind. App. 517, 187 N. E. 349.

Alspaugh v. *N. Y. C. & St. L. R. Co.*, 98 Ind. App. 280, 188 N. E. 869.

This action of the State courts has been recognized as valid in the United States Circuit Court of Appeals in the Seventh and Second Circuits.

Ex Parte Crandall, 53 F. (2d) 969 (C. C. A. 7), c. d. 285 U. S. 540.

We quote from page 971, second column:

> "The general right of Indiana citizens to begin actions of this nature, wherever service of process on the defendant could be had, *was always potentially qualified by the jurisdiction of equity to restrain the citizen from commencing the action in a foreign jurisdiction, where to do so would unreasonably, inequitable, and unfairly harass, oppress, or defraud the defendant.*
>
> "*The Federal Employers' Liability Act does not assume to remove this qualification*, and in our judgment does not exempt the citizen from invocation against him of this equitable jurisdiction under facts which would in general justify its application." (Italics ours.)

Bryant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, (C. C. A. 2). At page 571, first column, it is said:

> ". . . *The situation here is quite different; for even if the Virginia court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction.* . . . In the case at bar the questions adjudicated in Virginia were not those decided by motion in the Federal action. The Virginia decree was not granted because the action would burden interstate commerce, *but because it would unfairly vex and oppress the defendant, quite another ground.* . . ." (Italics ours.)

Injunctions against the prosecution of such cases in distant Federal District Courts have been granted.

B. & O. R. R. Co. v. *Bole*, 31 Fed. Supp. 221.

Atlantic Coast Line R. R. Co. v. *Bryant* in Virginia, referred to in *Bryant* v. *A. C. L. R. R. Co.*, 92 F. (2d) 569, *supra*.

B. & O. R. R. Co. v. *Inlow* (Unreported), referred to by the court below. Decision attached to petition for certiorari, Appendix B (p. 14).

Southern Ry. Co. v. *Ethel Painter, Admrx.*, 117 F. (2d) 100, Chancery Court, Knox County, Tennessee. The decision basis for petition for certiorari, No. 746, filed February 4, 1941.

VII. The Authorities Relied Upon by the Supreme Court of Ohio and the Respondent Do Not Support the Judgment of the Court Below

The Supreme Court of Indiana has held that the terms of Section 6 of the Federal Employers' Liability Act prevent a state court from enjoining a plaintiff in an action under that act from prosecuting a claim in any United States District Court in which the defendant does business. *McConnell* v. *Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

This decision was made notwithstanding the recognition in Indiana of the right to an injunction when the action under the Federal Employers' Liability Act is brought in a distant state court.

Kern v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 204 Ind. 595, 185 N. E. 446.

The Supreme Court of Ohio below at page 419 (R. 31) cites eight cases as supporting "by the overwhelming weight of authority" the doctrine of *McConnell* v. *Thomson, supra.*

Of the cases cited, all but one related solely to the question of jurisdiction of the court in which was brought the action against the railroad under the Federal Employers' Liability Act. Of course, a court given jurisdiction by the Federal statute cannot refrain from exercising that jurisdiction when invoked pursuant to the statute. The four following cases were decisions on motions to dismiss for want of jurisdiction, or to set aside service, involving only

the question whether or not the defendant railroad was doing business at the point served, or whether that jurisdiction could be denied by the court because of interference with interstate commerce. In none of them is there a consideration of the equitable principles asserted herein.

Connelly v. *Central R. R. Co. of New Jersey*, 238 Fed. 932;
Norris v. *Illinois Central R. R. Co.*, 18 F. (2d) 584;
Wood v. *Delaware & H. R. Corp.*, 63 F. (2d) 235 (C. C. A. 2);
Trapp v. *Baltimore & Ohio R. R. Co.*, 283 Fed. 655.

Southern Railway Co. v. *Cochran*, 56 F. (2d) 1019, was a decision of the Sixth Circuit Court of Appeals refusing a writ of prohibition against a District Judge to prevent his entertaining jurisdiction of an action under the Federal Employers' Liability Act. It did not seek an injunction against the plaintiff in a Federal Employers' Liability action, and involved solely a consideration of the jurisdiction of the District Court.

C. M. & St. P. R. Co. v. *Schendel*, 292 Fed. 326, s. c. 300 Fed. 273, was decided by the Eighth Circuit Court of Appeals on the basis that the Federal Court having acquired jurisdiction of an action under the Federal Employers' Liability Act had power to protect that jurisdiction to the extent of enjoining the railroad and others from interfering in the Iowa state courts with a proceeding in the Federal Court in Minnesota. The equitable phases were not involved. The court near the bottom of page 334 expressly says:

> ". . . We do not feel called upon to discuss the cases cited where the courts have held that equity may enjoin citizens of one state from bringing action in other jurisdictions. They do not apply to this situation. We are satisfied that the order was not

> issued on equitable grounds of oppression or hardship, but on the ground that the public policy of the state was being violated."

Hoffman, Judge v. *Missouri, ex rel. Foraker*, 274 U. S. 21, considered the jurisdiction of a state court of a Federal Employers' Liability action in a Missouri county traversed by the railroad, when the accident occurred in Kansas and the deceased was a citizen of that state. The defendant was a Missouri corporation, and the question raised and decided in that case was that the incidental burdening of interstate commerce did not interfere with the jurisdiction of the state court.

C. & O. Ry. Co. v. *Vigor*, 90 F. (2d) 7 (C. C. A. 6), was a case in which the Federal District Court for the Southern District of Ohio was asked to enjoin the prosecution of an action in the Federal District Court for the Northern District of Indiana on the ground of inequitable conduct on the part of the plaintiff in the Indiana suit, and unconscionable hardship imposed on the defendant in that suit by its prosecution at a distance from the scene of the accident, the residence of the plaintiff, and the residence of her decedent, all of which were in Ohio. A reason assigned by the court for its decision was that the facts alleged in the bill and set forth in the supporting affidavits did not justify the court in reversing the court below. At page 8 the court said:

> "We find no fact alleged in the bill or set forth in the supporting affidavits that would justify us in saying that the trial of the cause in the Indiana court would cast an unreasonable burden on the plaintiff or would give to the defendant an inequitable advantage."

The cases cited, therefore, do not sustain the point to which they are cited by the Supreme Court of Ohio, nor

the principle of the decision of the Supreme Court of Indiana in *McConnell* v. *Thomson, supra.*

The court also cited 28 *American Jurisprudence* 400, Sec. 217, an authority which relies in part upon *McConnell* v. *Thomson, supra*, which, it is submitted, was wrongly decided. In Note 19 various cases of this court are cited to the general rule that state courts have no authority to enjoin the proceedings in the Federal courts. None of these cases are at all like the case at bar. Four cases in 6 *Wallace* are cited, involving the same principle, the important opinion being *Riggs* v. *Johnson Co.*, 6 *Wallace* 166, 18 L. Ed. 768, in which the Supreme Court held that it was no defense to a mandamus proceeding in the Circuit Court of the United States against the County Commissioners requiring them to levy a tax to pay the judgment on county bonds awarded by that court, that the Commissioners had been enjoined in a state court from levying such tax, the suit for such injunction having been brought subsequent to the Circuit Court's judgment on the bonds. *Central National Bank* v. *Stevens*, 169 U. S. 432, 42 L. Ed. 807, is a case decided on the same general principle, in which a state court attempted to enjoin parties to a decree in the Circuit Court of the United States, determining their rights in their favor, from availing themselves of that decree, and compelling them to re-litigate their rights in the state court. *Moran* v. *Sturgis*, 154 U. S. 256, 38 L. Ed. 981, 14 S. Ct. 1019, was a case reversing an injunction granted in a state court against parties claiming to hold marine liens, from prosecuting their proceeding in Admiralty under which the U. S. Marshal had seized vessels belonging to a corporation which the state court was winding up, which seizure by the Marshal was made on the same day that state receiver was appointed or before the state receiver had taken possession.

Two other cases cited—*Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, 19 S. Ct. 119, and *Prout* v. *Starr*, 188 U. S. 537, 47 L. Ed. 584, 23 S. Ct. 398, were not cases involving injunctions by state courts, but, in the first was held invalid an injunction by the United States Circuit Court against the Commonwealth Attorney from prosecuting a criminal proceeding involving a decision of different questions from that to be determined in the United States Circuit Court, while in the second case, an injunction of the United States Circuit Court against Prout, Attorney General of Nebraska, was sustained, which order, among other things, enjoined him from proceeding with his action in a state court in which he sought a judgment contrary to a prior injunction in the United States Circuit Court against his predecessor and stipulations therein that that case would abide the judgment of *Smyth* v. *Ames*, 169 U. S. 466. No injunction was sought in the state court.

In the case at bar there is no attempt to have the state courts of Ohio draw to themselves or pass upon any of the issues of the case in the District Court of the United States for the Eastern District of New York, nor to compel the plaintiff therein to litigate his question in a state court. It would be entirely consonant with any injunction to be rendered, that the plaintiff employee bring his action in the District Court, the venue of which would be a reasonable one for the determination of the issues. The issues in the state court were entirely distinct from the issues to be determined in the Federal Court.

There is also cited in 28 *American Jurisprudence* 400, *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 266, 43 S. Ct. 79, 24 A. L. R. 1077, holding that a state court and a Federal court may each litigate the same questions at the same time, without interference, one with another,

where the actions are *in personam*. At page 235 of the opinion in 260 U. S. it was said:

> "The well established rule, to which we have referred, that where the action is one *in rem* that court—whether state or federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the *res*, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank. See *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 305. The rank and authority of the courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

Such was the principle applied by the Circuit Court of Appeals for the Second Circuit in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, applying the principle to an action for damage under the Federal Employers' Liability Act pending in the United States District Court for the Eastern District of New York, and a suit for an injunction by the defendant therein against the plaintiff in the state court of Virginia, based on the inequity of the proceeding in New York.

It is therefore submitted, that there is no overwhelming weight of authority, as said by Judge Hart in his opinion at page 419 (R. 31), "that the jurisdiction of the federal courts to determine causes arising under the Federal Employers' Liability Act cannot be enjoined or interfered with by a state or by state or other courts."

Great reliance is placed by counsel for respondent in his brief herein, on *Missouri ex rel. St. Louis, B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, a case in which a resident of Missouri, consignee of freight shipped from Texas to St. Louis, sued a Texas carrier under the Carmack Amendment in a state court of Missouri, in which state the defendant had no railroad or office. The plaintiff obtained jurisdiction over property of the defendant in the hands of other carriers by garnishment. A part of the transportation in question for which the defendant was made liable by the act, occurred in Missouri, the residence of the plaintiff, and as pointed out by the court "for aught that appears the negligence complained of occurred within Missouri." It was not a case of a resident of Texas going to a distant state to sue a defendant doing business in Texas. In fact, it was not a case where any relief was sought against a Missouri resident on the ground of inequitable conduct. It was a case entirely different from that at bar, where an Ohio resident, employing Ohio counsel, who could have easily brought his action in a state or Federal court sitting at the place of his residence, or in the adjoining county where the accident occurred, instead taking his action to a court more than 700 miles away, the farthest point that he could go and find the defendant doing business, and confessing by demurrer that this was done for the purpose of annoying, harassing and vexing the railroad company without a sound and proper purpose, and without any benefit to him.

ERROR OF INDIANA AND OHIO COURTS IN HOLDING THAT FEDERAL EMPLOYERS' LIABILITY ACT PREVENTED INJUNCTION OF PROSECUTION IN FEDERAL COURT

The Indiana Supreme Court in *McConnell* v. *Thomson*, *supra*, and the Ohio Supreme Court, assumed that the plaintiff in an action under the Federal Employers' Li-

ability Act is given a right by that act to sue the defendant railroad company in any United States District Court, in the district of which the defendant does business, and that such a right conferred by Federal statute cannot be interfered with by the courts, whereas, the plaintiff's right to sue in any state court having jurisdiction of the subject matter of the litigation, and of the defendant railroad company, is not a right given by Federal statute, and if his action in a state court be inequitable its prosecution may be enjoined. The error in this position is that the plaintiff's right to sue in the court of another state than that of his residence, is a right conferred upon him by Section 2, Article IV of the United States Constitution, as construed by this court.

Blake v. *McClung*, 172 U. S. 239, 256;
Chambers v. *B. & O. R. R. Co.*, 207 U. S. 142, 148;
Missouri Pacific R. Co. v. *Clarendon Co.*, 257 U. S. 533, 535.

A right conferred by the Constitution of the United States is certainly as important as a right conferred by statute. Equity can and should prevent an inequitable exercise of either right. The constitutional right to sue in a court of another state does not present a court at the domicile of that plaintiff from enjoining an inequitable invoking of that right.

Cole v. *Cunningham*, 133 U. S. 107, 109, 134; 14 R. C. L. 412, Sec. 113, *Injunctions*; 28 *American Jurisprudence*, 392, Sec. 206.

That a Federal statute confers the right to sue in a Federal court does not prevent another court from enjoining plaintiff in a suit brought pursuant to such statute from further prosecution thereof, when such prosecution is inequitable or fraudulent.

Steelman v. *All Continent Co.*, 301 U. S. 278, 290.

The Supreme Court of Ohio Erred in Its Interpretation of the Bryant Case

We call attention to the court's statement on page 421 of its published opinion (R. 32) where it said:

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the State Court of Virginia to enjoin the plaintiff from prosecuting his action in the Federal Court."

The Circuit Court of Appeals was not trying the injunction suit which the Railroad Company had brought in a state court of Virginia; on the contrary, it was deciding against an injunction by the employee sought in the federal court in Brooklyn to restrain the Railroad Company from acting in the Virginia state court. Near the bottom of the first column, page 571, the court, in the *Bryant* case, said:

> "The situation here is quite different, for even if the Virginia Court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction."

It seems to us, therefore, that the court's language in the *Bryant* case specifically was that the state court of Virginia had jurisdiction to enjoin the employee from prosecuting his suit in New York. It concluded that the action for damages in the Federal Court in New York could proceed, as could also the action of the Railroad for an injunction in the Virginia court. If, as the Supreme Court said, the court in the *Bryant* case did not approve the Virginia injunction, then what did the Circuit Court of Appeals mean by the quoted language? The federal court did not interfere with the prosecution of the Virginia injunction case, but said that it could progress, at the same time as the suit for damages in New York.

The Supreme Court of Ohio, we contend, appears to have fallen into an error, not unusual in these cases, of overlooking the fact that equity acts *in personam*, and that an action to enjoin is not an action against the foreign court, but against the state citizen who, it is claimed, is using a legal right in an equitable manner.

VIII. Whether the Conduct of an Ohio Citizen Is Equitable Is a Question of Law, Which an Ohio Court Having Jurisdiction of the Citizen Is to Determine in Accordance with That Law Unless Congress within Its Delegated Powers Has Made an Enactment Inconsistent with the Ohio Law

The Ohio law and the duty of an Ohio citizen not to prosecute vexatious and harassing litigation at great distances from the scene of the accident, the residence of the citizen, and the location of the witnesses, is established by the opinion of the Supreme Court of Ohio in *N. Y. C. & St. L. Rd. Co.* v. *Matzinger*, 136 O. S. 271, 25 N. E. (2d) 349. Kepner is a citizen of Ohio and subject to the laws thereof. As said by Mr. Justice Douglas in *Milliken* v. *Meyer*, U. S. , 61 S. C. R. 339:

> "The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. 'Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable' from the various incidences of state citizenship. See *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279. . . . *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. . . ."

Since the decision of this court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this court has, in repeated decisions, manifested a concern to sustain state law whether that law be the statutory law of the state, or the law determined by the courts of the state, save only where Congress within its

delegated powers has enacted legislation which clearly manifests an intent to supersede the state law. Such intent to supersede the state law is not ordinarily found from implication. The repugnance must be so direct and positive as that the two laws cannot be reconciled or consistently stand together. See authorities heretofore cited under heading II.

CLOSING SUMMARY

The right granted by section 6 of the Federal Employers' Liability Act to bring an action in the district "in which the defendant shall be doing business" must have been granted in the light of that power of equity to restrain in a proper case the abuse of the right due to the very great extent of territory in which the railroads do business. An injunction to prevent prosecution of such action vexatiously many hundred miles distant from the residence of plaintiff, the place of the accident and the location of the witnesses, still leaves in the plaintiff the right to bring his action in a convenient district in which the defendant does business. The statute does not expressly provide that he may bring his action in every such district. This court prohibits such actions in state courts if the business is only the maintenance of an office for solicitation, where the prosecution thereof would burden interstate commerce, and no reason is apparent for a distinction were the selected tribunal a Federal District Court. The Federal Employers' Liability Act nowhere expressly denies the right to the equitable relief sought by the petitioner and denied by the Ohio courts. Displacement of the local law is not to be inferred unless clearly indicated by considerations persuasive of the statutory purpose. The state law must yield only if the purpose of the Act of Congress cannot be otherwise accomplished. Certainly it will not be contended that the bringing of an action by respondent in the Eastern District of New York, which is the point farthest removed where suit could be brought, is essential to the accomplishment of the purposes of the act.

The right to bring an action in a distant district under Section 6 of the Federal Employers' Liability Act is no more sacred than that established by the Federal Constitution to sue in any State, the same as citizens of that State. If, when the distant action be under the circumstances inequitable, prosecution of the latter can be enjoined, so should the prosecution of the former. That a federal statute confers the right to sue in a federal court does not prevent another court from enjoining the plaintiff in a suit brought pursuant to that statute from further prosecution thereof when such prosecution is inequitable. No attack was made below on the jurisdiction of the District Court in the Eastern District of New York, nor on its process, nor is any made now, nor any attempt to interfere with any action of that court. It was only sought to compel a citizen of Ohio to conduct himself in accordance with the laws of Ohio, and refrain from prosecuting harassing and vexatious litigation, since he had abundant opportunity of litigating his cause of action without such harassment and vexation. That conduct was determinable by the laws of Ohio and the Supreme Court of Ohio erred in setting aside its own judgment in that respect due to a mistaken construction of the Federal Act, and of the decisions of the federal courts.

It is therefore respectfully submitted, that the Supreme Court of Ohio was in error in not applying to this case the Ohio law as heretofore determined by it; that it erred in its construction and effect of Section 6 of the Federal Employers' Liability Act, and that its judgment should be reversed.

Morison R. Waite,
Harry H. Byrer,
William A. Eggers,
Philip J. Schneider,
Counsel for Petitioner.

Waite, Schindel & Bayless,
Attorneys for Petitioner.

March 17, 1941.

SEP 29

Supreme Court of the United States

October Term, 1941

No. 20

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEFNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE PETITIONER ON THE MERITS

CASSIUS M. CLAY,
MORISON R. WAITE,
HARRY H. BYRER,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio,
Attorneys for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Supreme Court of the United States

October Term, 1941

No. 20

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE PETITIONER ON THE MERITS

I

In addition to recent cases of this Court cited at pages 16 and 17 of Petitioner's Brief on the Merits, in which the federal power granted under acts of Congress were held not to exclude powers of a state not prohibited, we cite later cases of the Court to the same effect:

Arkansas Corporation Commission v. *Thompson*, 313 U. S. 132, 61 S. C. R. 888;
Skiriotes v. *State of Florida*, 313 U. S. 69, 61 S. C. R. 924;
People of State of California v. *Thompson*, 313 U. S. 109, 61 S. C. R. 930;
Watson v. *Buck*, U. S. , 61 S. C. R. 962.

II

During the oral argument of this case last April, reference was made by the Court to the power of courts, includ-

ing the federal courts, to decline jurisdiction in a proper case, when there is no want of another suitable forum. As there may be discussion again with respect to that point, there are cited here cases in support of that proposition.

Canada Malting Co. v. *Paterson Co.*, 285 U. S. 413, 422;
Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 131;
Commonwealth of Massachusetts v. *State of Missouri*, 308 U. S. 1;
Pennsylvania v. *Williams, et al., Receivers*, 294 U. S. 176;
Penn General Casualty Co. v. *Pennsylvania*, 294 U. S. 189.

The doctrine i one frequently applied in England, and is sometimes ref :red to as the doctrine of *forum non conveniens.*

Logan v. *Bank of Scotland* [1906], 1 K. B. 141;
Egbert v. *Short* [1907], 2 Ch. 205;
Norton v. *Norton* [1908], 1 Ch. 471;
La Societe Du Gaz De Paris, Pursuers—La Societe Anonyme De Navigation—"Les Armateurs Francais," Defenders, [1926] Session Cases (H. L.) 113.

In the last case Lord Shaw of Dunfermline at page 20 said:

> "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a *forum* which is not the natural or proper *forum*, either on the ground of convenience of trial or the residence or domicile of parties, or of its being the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied."

Another case of great importance is one in which the House of Lords declined jurisdiction notwithstanding the Appellate Jurisdiction Act of 1876, providing that an ap-

peal lies to the House of Lords from any order of the Court of Appeal in England.

Secretary of State for Home Affairs v. *O'Brien* [1923], 1 Appeal Cases (H. L.) 603.

It is thus apparent that the mere conferring of jurisdiction by statute gives no absolute right to proceed in a court having jurisdiction so conferred, when there are good reasons for the trial of the case in another and more appropriate forum. The Respondent, doubtless to toll the statute of limitations, has brought an action in the Common Pleas Court of Hamilton County, Ohio, filed May 14, 1941, on the same cause of action as that pending in the Eastern District of New York, which Ohio case is now at issue and ready for trial. There is thus no want of another suitable forum, one selected by the Respondent from several available and suitable for the trial of the controversy.

The Federal Employers' Liability Act not having created an absolute right in the Plaintiff to resort to a wholly inappropriate court, it cannot be said that Congress by its enactment, deprived the courts of the State of Ohio of the power to enjoin the Ohio citizen and resident from so proceeding, "for the purpose of annoying, harassing and vexing the plaintiff herein" (The Baltimore and Ohio Railroad Company), which quotation is an allegation of the petition below admitted by the demurrer.

Respectfully submitted,

CASSIUS M. CLAY,
MORISON R. WAITE,
HARRY H. BYBEE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

September 22, 1941.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 20

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE RESPONDENT ON THE MERITS.

SAMUEL T. GAINES,
EDWARD M. BALLARD,
GEORGE METZGER,
Counsel for Respondent.

BUDDEN AND GAINES,
Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 678.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE RESPONDENT ON THE MERITS.

SUMMARY OF SUPPLEMENT TO BRIEF.

I. Construction of Section 6, if resorted to, does not sustain petitioner's claims of congressional purpose and intent.

A. Revealing aids to construction:

1. Announced understanding of the bill by Senator Borah, submitting report from Committee on the Judiciary.
2. Understanding as revealed in House debate.
3. Language adopted goes far beyond what would have been necessary if sole purpose was that urged by petitioner.
4. Adoption of provision against removability emphasizes purpose to vest in employee absolute choice of forum within limitations specifically set forth.
5. Policy and purpose of Federal Employers' Liability Act supports respondent's position.
   a. Privileges and rights intended to be vested in employee and against employer.
   b. Uniformity of applicable law will not be served by adoption of petitioner's position.

6. Congressional record reveals no mention of the equity rule for which petitioner contends.

   a. In light of announced understanding of bill, by Senator Borah and in the House, and admitted appreciation by Congress of possible inconvenience and hardship to employer by exercise of rights literally construed, failure to refer to such equity rule does not indicate intention that it limit and abridge rights specifically set forth. (*Expressio unius est exclusio alterius.*)

APROPOS AIDS TO CONSTRUCTION OF SECTION 6.

The petitioner asserts that construction of Section 6 if resorted to, will reveal that the sole congressional purpose in the enactment of the venue and jurisdictional provisions thereof, was to abate the mischief of hardship to the employee. Where exercise by the employee of such provisions in their literal, plain meaning conflicts with the equity rule contended for by the petitioner, it asserts that Congress intended the literal meaning of the federal statute to yield and become subordinate to the equity rule, which in the instant case it asks a state court to apply. It is the respondent's position, that the language used by the Congress is unambiguous, clear, plain and express; that the literal meaning thereof is persuasive of its purpose; that such meaning leads to no absurd or futile result nor "an unreasonable one plainly at variance with the policy of the legislation as a whole" and hence there exists no reasonable necessity for construction.

Available aids to construction, if resorted to, however, we submit, demonstrate clearly that the petitioner's claims are untenable. The Federal Employers' Liability Act was enacted in 1908. It began immediately to run the gamut of the trials and tribulations of judicial appraisal and practical operation and by 1910 the Congress was confronted with several matters revealed thereby as warrant-

ing its attention. Thus the report of the Senate Committee on the Judiciary to accompany H. R. 17263, 61st Congress, 2d Session, reads:

> "The proposed amendments to the employers liability bill may be considered under three heads: First, as to the venue of such an action; Second, as to the concurrent jurisdiction of the courts of the several States; and Third, as to the survival of the right of action."

Section 51, Jud. Code requiring suit based on a law of the United States to be instituted in the district of which the defendant was an inhabitant had been held applicable to an action under the Act. Language in the Senate Committee Report, *supra*, referred to this requirement of filing suit under the Act in a district which "may be at a place in a distant State far from the home of the plaintiff and may be a thousand miles or more from the place where the injury was occasioned" as "a grave injustice to the plaintiff" which, "ought not to be permitted to exist." Upon such language as this the petitioner in great measure relies to sustain its claim that the sole purpose of the congressional enactment was to abate the mischief of hardship to the employee. But the petitioner overlooks many aids to construction which reveal the real purpose of the Congress.

Senator Borah in submitting the report of the Committee on the Judiciary, *supra*, stated, in language unmistakably clear and lucid, the purpose of the amendment. He said:

> "*The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.*" (Italics ours) Congressional Record Volume 45, Part 4, page 4034.

To be sure Congress intended to abate the mischief which beset the employee but such abatement flowed natu-

rally from the larger purpose to vest in the employee, within the orbit specifically set forth, a right to determine the forum where his action was to be tried. The eyes of Congress had been opened to the necessity for venue and jurisdictional provisions in harmony with the policy of the Act. The result was a statute, the purpose of which was to vest in the employee the right to lodge his action "if he chooses to do so" in a federal court "where it (the employer) is actually carrying on business." Possessed of such right of choice, hardship to the employee automatically vanishes.

The proposed amendment as first passed by the House provided that:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of either plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of the commencement of such action."

The Senate Committee recommended that the words "either the plaintiff or" be stricken and that in lieu of the word "found" the phrase "doing business" be inserted. These amendments were approved by the Senate and the House. When the bill went back to the House the following was said apropos thereof, Congressional Record, Vol. 45, Part 4, page 4158:

> Mr. Parker—"The House bill provided that a suit might be brought either in the Court having jurisdiction at the residence of the Plaintiff or at the residence of the defendant or where the cause of action arose, or where the defendant was found. The Senate preferred not to have the suit brought where the plaintiff resided and thought that he ought to bring the suit where the defendant resided or where the cause of action arose, or where the defendant was not merely found but doing business."
>
> Mr. Mann—"And the bill now provides that suit may be brought against the defendant wherever the defendant is doing business."

Mr. Parker—"Yes—instead of where it is found."

Mr. Garrett—"Now are all laws and parts of laws in conflict with the act repealed?"

Mr. Clayton—"Why they would be repealed—"

Mr. Garrett—"By implication."

If the congressional purpose was solely to prevent the hardship of suit in a district far "from the home of the plaintiff" or from the "place where the injury was occasioned" (the mischief stressed by the petitioner), such hardship could have been abated by a provision permitting suit where the cause of action arose or where the plaintiff resided, if proper service could there be had on the defendant or if the defendant was doing business there. In such case then there would be no reason to include the clause "or (the district) in which the defendant is doing business at the time of commencing such action." The Congress was well aware that railroad companies operated over long distances and at places far distant from one another. The language chosen expresses clearly the intent of the bill as Senator Borah stated that he understood it and as the Congress, too, we submit, understood it for no voice was raised to object to Senator Borah's clearly enunciated understanding of the bill. The purpose to give to the employee a choice of forum is manifest.

The purpose is further emphasized by the adoption of the provision against removability. During the debate on the bill, Senator Paynter (Kentucky), said, Cong. Record, Volume 45, Part 4, page 4051:

> "I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried. He can select the federal or the state court, as he may prefer, to try his case arising under the Act in question."

And to further emphasize this right of choice in the employee the provision against removability was adopted. If the employee chose a state court, this exercise of his

right of choice was not to be disturbed even by a federal statute. It is the right of choice in the employee which is thus the core of the congressional purpose.

Witness also the policy and purpose of the entire Federal Employers' Liability Act. There is indicated a continuous effort to vest greater and greater privileges and rights in the employee. The abandonment of the fellow servant rule, the modification of the defense of contributory negligence, the denial of the defense of assumption of risk, first in safety appliance cases and now in all cases, the repeated enlargement of the statute of limitations all point in this direction. A necessary implication of the adoption of the petitioner's claim would be to wrest from the employee the right of choice of forum and to give it in effect to the employer who could thus frequently prevent the employee from trying his action in a jurisdiction distasteful to it.

Uniformity of controlling law was one of the prime purposes of the Federal Employers' Liability Act. (See *N. Y. C. v. Winfield*, 244 U. S. 147.) The adoption of petitioner's view, we submit, will not lead to uniformity. Each court of equity appealed to would have the power to determine in each instance what amounts to an inequitable exercise of his rights by the employee. The purpose of uniformity in such event will not be served. The right to enjoin, if permitted, would be resorted to frequently. Witness the case of *B. & M. R. R. Co. v. Whitehead*, cited by petitioner in its brief page 11, where suit was instituted to prevent an action brought in a place within 100 miles from where the cause of action arose. Even if a court of equity were to deny applications in such instances, delay and expense would be the inevitable lot of the employee.

What has been pointed out above, we submit, establishes clearly the congressional purpose to vest in the employee a right of choice of forum which can have substance only if it be a right unfettered by any such equity rule as petitioner advances.

What has been said, we submit, also disposes of the petitioner's argument that the congressional intent was to give the employee "no greater right than the ordinary litigant." (Petitioner's Brief, p. 21.) The employee under the Act, it is clear, enjoys many rights and privileges which do not apply to ordinary litigants and the right of choice of a federal district, as specifically set forth in the Act, is clearly one of these rights.

The petitioner asserts that the Congress realized and appreciated that the broad venue provisions might result in an exercise thereof by the employee which would be a hardship and inconvenience to the employer and it argues that failure to deny specifically the applicability of the equity rule, implies an intent to limit by such rule, the enjoyment of the specific rights granted to the employee.

Nowhere in the Congressional debates apropos the amendment in question, is there any reference to this equity rule. In the House, one of the members, Congressman Garret, inquired as pointed out above:

> "Now are all laws and parts of laws in conflict with the act repealed?"

This indicates clearly an intent that conflicting laws be repealed by the new amendment. Certainly it will not be denied that conflict exists between the respondent's right of choice in accordance with the literal meaning of the language used and the equity rule by means of which the petitioner seeks to prevent him from doing that which the federal statute permits.

If Congress intended to permit a court of equity to limit and abridge this substantive right of choice of forum which it so clearly vested in the employee, it would have been an easy thing for it to have said so and if any member of Congress had any such intention, it is reasonable to believe that he would have given voice to it especially in the light of what actually was said and the possible inconvenience and hardship to the employer which was under-

stood. The maxim "*expressio unius est exclusio alterius*," would here seem to be applicable.

Construction, if resorted to despite the plain, clear and unambiguous language of the statute, we submit, confirms a congressional purpose and intent accurately expressed in the literal, plain meaning of the language used.

What the petitioner actually contends for is a doctrine of equitable construction, apropos which it is said in 25 *R. C. L.* page 1023.

> "But the proposition, however it may once have been held or considered that the courts upon what is termed an equitable construction or otherwise, may, against the plain language of a statute, in opposition to the intent clearly expressed by the words, mitigate the 'violence of the letter' by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience has been too long and too frequently rejected to be now the subject of serious argument or doubt. Such doctrine, if it ever existed, was long since exploded."

The respondent seeking to exercise the substantive right of choice of a federal court, so clearly expressed by *Senator Borah*, *supra*, we submit, ought not to be enjoined from such exercise by a state court because the district which he chooses in accordance with the paramount, federal congressional enactment happens to be inconvenient or distasteful, for one reason or another, to the employer.

Respectfully submitted,

SAMUEL T. GAINES,
EDWARD M. BALLARD,
GEORGE METZGER,
Counsel for Respondent.

BORDEN & GAINES,
EDWARD M. BALLARD,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 678.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of Ohio.

EDWARD M. BALLARD,
GEORGE METZGER,
Gwynne Building,
Cincinnati, Ohio,

BORDEN AND GAINES,
National City Building,
Cleveland, Ohio,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 678.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of Ohio.

THERE IS NO REASON TO GRANT THE WRIT OF CERTIORARI IN THE INSTANT CASE.

The instant petition for a writ of certiorari does not present a case where the Ohio Supreme Court has decided a federal question of substance not heretofore determined by this Court, or a case in which the Ohio Supreme Court has decided it in a way probably not in accord with applicable decisions of this Court.

> "Rule 5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
>
> (Rules, Supreme Court of the United States.)

The instant petition for certiorari raises exactly the same question which was before this Court in *C. & O. Ry. Co. v. Vigor*, 302 U. S. 705, 82 L. Ed. 545, 58 S. C. R. 25. In that case this Court denied a petition for certiorari to the U. S. Circuit Court of Appeals (6th Circuit), which Court in *C. & O. Ry. Co. v. Vigor*, 90 Fed. (2d) 7, held in the following pertinent syllabus that:

> "2. Railway company held not entitled to injunction against administratrix's prosecution of action against it for employee's death, in Federal Court for the district in which it is doing business, on the ground of inconvenience or extra expense in producing witnesses residing in another state, wherein deceased was injured and administratrix resided.
>
> "3. Railway company held not entitled to injunction against prosecution of suit against it, for employee's death, in Federal Court for district of another state than that in which plaintiff and defendant's witnesses resided and deceased was injured, on the ground that defense of such suit would place unreasonable burden on interstate commerce.
>
> "4. Congress, having power to regulate interstate commerce, may place incidental burdens thereon, by jurisdictional statutes, such as act authorizing filing of suit for damages, under the Federal Employers' Liability Act, in any district wherein defendant is doing business."

The briefs of both the petitioner and respondent in the *Vigor* case, *supra*, in this Court, indicate clearly that the question in that case was identical with the question raised by the instant petition.

> "The lower courts regarded the Federal Employers' Liability Act, permitting the filing of the respondent's action in Hammond, Indiana, as controlling, and treated the said act of Congress as one inhibiting such a case as the railway company instituted for an injunction." Petitioner's Brief, page 9, *C. & O. v. Vigor* (U. S. Supreme Court) *supra*.
>
> "The real question involved is whether or not the District Court of the United States for the Southern

District of Ohio (Sixth Circuit) may enjoin respondent from prosecuting a suit in the District Court of the United States for the Northern District of Indiana (Seventh Circuit) to recover damages for the death of her intestate under the provisions of the Federal Employers' Liability Act, it being admitted that deceased was engaged in interstate commerce at the time of his injury and that petitioner was doing business in the Northern District of Indiana at the time the suit was filed." Respondent's Brief, page 2, *C. & O. v. Vigor* (U. S. Supreme Court) *supra.*

The decision of the Ohio Supreme Court is in full accord with and follows the law, the logic and the decision of the *Vigor* case.

Nor is there any conflict in the decisions of Courts of last resort which have considered the question here raised. Every such Court of last resort has denied the contentions advanced here by the petitioner (*B. & O. R. R. Co. v. Kepner*, 137 Ohio St. 409; *McConnell v. Thomson*, 213 Indiana 16, 8 N. E. (2d) 986; *C. & O. Ry. Co. vs. Vigor, supra; C., M. & St. P. R. Co. v. Schendel*, 292 Fed. 326). Only one reported decision by any Court, high or low, anywhere sustains the petitioner's claims *B. & O. R. R. Co. v. Bole*, 31 Fed. Supp. 221. The opinion in the *Bole* case is by a District Court Judge upon a motion for a temporary injunction in an ex parte hearing where the employee was not represented. As obvious as the fact that such Court had before it only the railroad company contentions is the fact also that the Court was not fully and correctly apprized of the applicable law. *B. & O. v. Inloe* (Petitioner's Brief, page 34), by an inferior Ohio Court, was definitely discountenanced and overruled by the Ohio Supreme Court in *B. & O. v. Kepner, supra. C. & O. v. Bryant* (Petitioner's Brief, page 34) was by an inferior Virginia Court again apparently in an ex parte hearing in which the employee did not appear and was not represented. Patently no conflict warranting this Court's attention exists among the reported cases.

The instant petitioner does not rely upon any right, title, privilege or immunity under any statute of the United States or the Constitution of the United States. It does not claim to have been denied any such title, right, privilege or immunity. This Court has denied certiorari in the *Vigor* case, *supra*, where the identical question here involved was before this Court. The Ohio Supreme Court has not decided any federal question of substance not heretofore determined by this Court. The Ohio Supreme Court has not decided the instant case in a way probably not in accord with applicable decisions of this Court. The decision of the Ohio Supreme Court is in full accord and on all fours with the decision in the *Vigor* case. There is no conflict whatsoever of reported decisions of Courts of last resort. It is respectfully submitted that no reason warrants the granting by this Court of a review on writ of certiorari and that the instant petition accordingly should be denied.

SUMMARY OF ARGUMENT.

I. (A) The power of Congress over interstate commerce is supreme, plenary, exclusive, complete in itself, and not to be hampered by the action of the states or state courts: *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, *Second Employers' Liability Act* cases, 223 U. S. 58; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501; *Wilson v. New*, 243 U. S. 332; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

(B) Laws of the United States made in pursuance of federal constitution are supreme law of the land binding judges in every state. *Robb v. Connolly*, 111 U. S. 637; Article VI, Clause 2—Constitution of the United States.

II. (A) Respondent's conceded right to sue in District Court for the Eastern District of New York pursuant to 45 U. S. C. 56 is substantive, can not be abridged, and entitles respondent to whatever remedial advantage inheres in the forum chosen.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U. S. C., Sec. 56.

Petitioner's Brief, page 43, conceding jurisdiction; *Missouri, etc. v. Taylor*, 266 U. S. 200, 209.

(B) District Court duty to assume jurisdiction pursuant to 45 U. S. C. 56, referred to also as Section 6, is mandatory. *Second Employers' Liability Act* cases, *supra*; *Schendel v. McGhee, District Judge*, 300 Fed. 273; *So. Railway v. Cochran*, 56 Fed. (2d) 1019.

(C) Historical background shows a clear congressional intent in Section 6 to allow employee to exercise choice of federal court there indicated.

(1) Historical tendency to liberalize act in favor of the employee.

(a) Abolition of fellow-servant rule, making contributory negligence a *pro tanto* defense, creating absolute liability in Safety Appliance Act cases, abolishing defense of assumption of risk; extending statute of limitations.

(2) Congressional Committee reports on amendment which became 45 U. S. C. 56 in 1910.

(a) "It seems clear from these decisions that a suit in a federal court under this law (prior to enactment of Section 6), where jurisdiction is founded on the fact that the case involves a federal statute, must be brought in the district of which the defendant is an inhabitant." • • • "No argument is necessary to convince that this is a grave injustice to the plaintiff. Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a federal court on a right based on the law of the United States." Report 432, Mr. Borah reporting from the Committee on the Judiciary of the Senate, and Report 513, Mr. Sterling from the Committee on the Judiciary of the House, 61st Congress, Second

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(D) Respondent's right to recover under the Federal Employers' Liability Act can not be destroyed or frustrated by state action. *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 509; *C. M. & St. P. R. R. Co. v. Schendel*, 292 Fed. 326; *Atcheson, T. & S. F. Ry. Co. vs. Sowers*, 213 U. S. 55; *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

(E) Valid Congressional exercise of constitutional power may properly result in incidental burdens on interstate commerce and cause inconvenience, hardship and extra expense. *So. Railway v. Cochran, supra; Hoffman v. State of Missouri*, 274 U. S. 21; *D. & R. G. R. Co. v. Terte*, 284 U. S. 284; *C. & O. v. Vigor*, 302 U. S. 705; *Connelly v. C. R. R. Co. of N. J.*, 238 Fed. 932; *Trapp v. B. & O., supra; C. M. & St. P. R. Co. v. Schendel, supra.*

III. Discussion of authorities cited by petitioner.

(A) The only reported decision cited by petitioner which is in point is by an inferior District Court on a motion for a temporary injunction rendered after an ex parte hearing where employee was not represented. *B. & O. R. R. Co. v. Bole*, 31 Fed. Supp. 221.

(B) Other cases where injunctive relief was granted are either:

(1) Cases where suit of employee was filed in state court.

(a) Indiana cases differentiated by Indiana Supreme Court in *McConnell vs. Thomson, supra.*

(2) Cases other than Federal Employers' Liability Act cases.

(a) *Davis v. Farmers' Cooperative Co.*, 262 U. S. 312, differentiated in *State of Missouri v. Taylor, supra; Hoffman v. State of Missouri, supra; D. & R. G. R. Co. v. Terte, supra; International Milling Co. v. The Columbia Trans. Co.*, 292 U. S. 511.

(C) Other cases not in point.

(1) *Douglas v. N. Y., N. H. & H. R. Co.*, 279 U. S. 377 in which suit of employee was brought in a state court. This Court held Federal Employers' Liability Act did not purport to compel a state court to assume jurisdiction as against an otherwise valid excuse. But this Court has held consistently, *supra*, that the jurisdiction of federal district court thereunder is mandatory.

(2) Cases which concern matters with reference to which Congress has not acted. But Congress having acted in Section 6 preempts that field and such act "insofar as it deals with the subjects to which it relates, is supreme and exclusive." (*S. A. L. Ry. Co. v. Kenney*, 240 U. S. 489, one of the cases in this group cited by petitioner.)

(3) *Bryant v. A. C. L. R. Co.*, 92 F. (2d) 569 concerned right of federal court to enjoin a state court which was not disturbing the federal court's jurisdiction, federal court action based on statute prohibiting injunction to stay proceedings in any state court.

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Sec. 379, Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265.

(4) *Steelman v. All Continent Corp.*, 301 U. S. 278. Injunction allowed by federal court where its jurisdiction under bankruptcy act was likely to be thwarted by filing of other suit. This case, in fact, would seem to support the view that the jurisdiction of the federal court for the Eastern District of New York should likewise be protected from a state court of equity which by injunction, to all intents and purposes, would impair jurisdiction of federal court and nullify Section 6.

IV. Other claims of petitioner are erroneous.

(A) Petitioner's claim that the district in which the defendant is doing business does not mean any district is

frivolous and inane. Historical background, plain meaning of language and authorities indicate clearly a right to institute suit in any district in which the defendant is doing business. *C. & O. v. Vigor, supra; C. M. & St. P. R. R. Co. v. Schendel, supra; Moore v. C. & O. Ry. Co.*, 291 U. S. 205.

(B) View of the petitioner that Article IV, Section 2 of the Constitution of the United States may be said to be violated where state enjoins suit by its own citizen in another state is bottomed on failure to understand that said Article IV, Section 2 does not govern the relationship between a state and its own citizens and requires only that a state not discriminate as against citizens of another state. *Slaughter House Cases*, 16 Wall. 77; *Cole v. Cunningham*, 133 U. S. 107.

CONCLUSION.

To grant petitioner's claims would be to destroy the Federal Employers' Liability Act, create a chaotic condition which would pervert and mutilate Section 6, and compel employee either to sue in that district which best suits the convenience of the carrier, or suffer the delay and expense of two law suits, the first to determine whether he may sue in that district in which the Congress has vested in him a federal substantive right to sue.

No reason exists for reviewing this case. The decisions of the courts are not in conflict; this Court has already denied certiorari in a case with the decision of which the Ohio Supreme Court in the instant case is in full accord. *C. & O. v. Vigor*, 302 U. S. 705. The instant suit is one brought only to delay the trial of the respondent's action on its merits. This delay should be ended. The petition for certiorari should be denied.

ARGUMENT.

I.

Article I, Section 8 of the Constitution of the United States vests in the Congress of the United States a power over interstate commerce which is supreme, exclusive, plenary, complete in itself and not dependent on and not to be hampered by the action of the states. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; *Savage v. Jones*, 225 U. S. 501, 533, 56 L. Ed. 1182, 1195, 32 Sup. Ct. Rept. 715, 726; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501, 34 Sup. Ct., 635, 638 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475); *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 41, 36 Sup. Ct. 483, 60 L. Ed. 874; *Second Employers' Liability Act Cases*, 223 U. S. 58, 32 Sup. Ct., 169, 178, 56 L. Ed. 327; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893.

In *Robb v. Connolly*, 111 U. S. 637, Justice Harlan said:

> "Upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, wherever those rights are involved in any suit or proceeding before them, for the judges of the state courts are required to take an oath to support that Constitution and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding' (Article VI, Clause 2 of the Constitution of the United States)."

II.

The Federal Employers' Liability Act, as amended, Section 6 (45 U. S. C., Sec. 56) vests in the respondent a clear, concise, definite, substantive federal right to institute his action in the U. S. District Court for the Eastern Dis-

trict of New York. On page 43 of its Brief, the petitioner says:

> "No attack was made below on the jurisdiction of the District Court in the Eastern District of New York, nor on its process, nor is any made now."

The right of the respondent to determine the jurisdiction in which to file his cause of action, pursuant to Section 6 of the Federal Employers' Liability Act, is a substantive right that cannot be abridged. See *Missouri, etc. v. Taylor*, 266 U. S. 200, 209, 45 S. Ct. Repr. 47, 69 L. Ed. 247, where this Court said:

> "The grant of concurrent jurisdiction implies that in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961."

Assuming jurisdiction to exist, there is a mandatory duty upon the District Court to take that jurisdiction and try the case. The Court cannot be concerned with the justice or the wisdom of Section 6. *Second Employers' Liability Act* cases, 223 U. S. 58, 32 Sup. Ct., 169, 178, 56 L. Ed. 327; *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755; *Schenael v. McGhee, District Judge*, 300 Fed. 273; *Norris v. Ill. Central*, 18 Fed. (2d) 584; *Trapp v. B. & O.*, 283 Fed. 655; *Connelly v. Central R. Co. of New Jersey*, 238 Fed. 932; *So. Railway v. Cochran*, 56 Fed. (2d) 1019; *Wood v. D. & H. Ry. Co.*, 63 Fed. (2d) 235; *C. & O. v. Vigor*, 90 Fed. (2d) 7; *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

The Federal Employers' Liability Act shows a constant Congressional intention to enlarge the rights of the employee, to liberalize the Act in his favor and to render ever easier and more certain his right and ability to recover for injury sustained during the course of his employment. The Congress abolished the fellow-servant rule and made contributory negligence only a *pro tanto* defense. The

Congress later rendered unavailable to carriers, the defenses of assumption of risk and contributory negligence in cases covered by the Federal Safety Appliance Acts. An absolute liability was thus imposed on the carrier where the violation of such statutes contributed directly to the injuries. In 1939 the Act was again amended to take away from the carrier the defense of assumption of risk in every case in which the injury or death of the employee resulted in whole or in part from the negligence of any of the officers, agents, or employees of the carrier. The statute of limitations has been enlarged from one year to two years and now by amendment in 1939 to three years.

Section 6 came into being by amendment in 1910. Theretofore an action under the Federal Employers' Liability Act, like any other action arising under a law of the United States, if commenced in a Federal Court, had to be brought in the district of which the defendant was an inhabitant, which in the case of a corporation was the jurisdiction in which the charter of the defendant corporation was issued. Section 51, Judicial Code. This was true even if diversity of citizenship existed. (*Macon Grocery Co. v. A. C. L. R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; *Shaw v. Quincy Mining, etc.*, 145 U. S. 445, 12 Sup. Ct. 935, 36 L. Ed. 768; *Galveston, etc. v. Gonsalez*, 151 U. S. 496, 14 Sup. Ct. 491, 38 L. Ed. 248; *So. Pac. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.) The purpose of the 1910 amendment, the Court points out, in *Trapp v. B. & O. R. R. Co., supra*, is clearly set forth in the Senate Judiciary Committee's Report recommending its enactment. It was to enlarge the provisions of Section 51, Judicial Code, so as to permit the suit to be brought in any one of the places provided by the Amendment instead of in the single district of which the employer was an inhabitant.

The Ohio Supreme Court, therefore, was eminently correct in stating that:

> "It is obvious that when Congress amended the act in 1910 and thereby provided that an employee plaintiff

might bring his action in the district of the residence of a defendant, or in which the cause of action arose, or in which a defendant was doing business at the time of commencing such action, it gave him, and intended to give him, his free choice to bring his action in any one of the three possible locations mentioned in the statute, and gave him this right with full knowledge that it would permit him, under the permissive circumstances named in the statute, to bring his action in courts far distant from the place where his cause of action arose." *B. & O. R. R. Co. v. Kepner, supra*, R. p. 79.

This Court in *Missouri, etc. v. Taylor, supra*, pointed out that the person endowed with a choice of jurisdiction is entitled "to whatever remedial advantage inheres in the particular forum" he chooses. If a state court may enjoin the exercise by a citizen of the United States of such a definite, clear, concise, and substantive federal right as is vested in respondent by Section 6, and nullify the privilege which Congress intended to vest in such citizen, it would be

"taking a privilege from one upon whom it is conferred by statute, and giving it to the opposite party against whom that specific privilege was granted." *C. & O. v. Vigor*, 17 Fed. Supp. 602.

This Court in *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 509, 36 Sup. Ct. 683, 689 (60 L. Ed. 1125) said, apropos the employer's effort to invoke certain sections of the Idaho Code adverse to the employee's rights, that:

"Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield."

In *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326, the first paragraph of the syllabus reads:

"Under the Employers' Liability Act, Section 6, the * * * jurisdiction thus conferred on the Courts of the

United States cannot be interfered with by a state, either through its Legislature or Courts, and a state statute which prohibits a citizen of a state from bringing an action under the Act in a Federal Court of a district in which the defendant is doing business, is unconstitutional."

This Court in *Savage v. Jones, supra,* said:

"When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

See also *L. & N. R. Co. v. Hughes,* 201 Fed. 727, 744, where the Court says:

"The rule may be deduced from all of the cases, that a state act necessarily by its requirements bringing about a conflict with the requirements of an act of Congress on the same subject produces that direct interference with interstate commerce which is not permissible."

In *Missouri, etc. v. Taylor, supra,* this Court said:

"No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right. *Central Vermont Ry. Co. v. White,* 238 U. S. 507, 511, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Atlantic Coast Line R. R. v. Burnette,* 239 U. S. 199, 36 S. Ct. 75, 60 L. Ed. 226; *New Orleans & Northeastern R. R. Co. v. Harris,* 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *Yazoo & Mississippi Valley R. R. Co. v. Mullins,* 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754."

Chief Justice Marshall in *Gibbons v. Ogden, supra,* phrased the law pertinent hereto as follows:

"Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

In *McConnell v. Thomson, supra*, the Supreme Court of Indiana held in the following pertinent syllabus that:

"1. A state court's equity powers are ineffectual against valid exercise of legislative power by United States Congress."

"2. A state court cannot limit United States citizen's exercise of right conferred by valid act of Congress, since state itself in exercise of full sovereign power cannot limit or abridge such right."

"3. An Indiana equity court had no power to enjoin Indiana citizen from prosecuting action in Federal Court of another state under Federal Employers' Liability Act, since such injunction would destroy federal right of litigant and obstruct federal court in performance of duty (Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 *et seq.*)."

The Supreme Court of Indiana reviews the law at considerable length and reaches the conclusion that:

"Congress can, and by the provisions of the Federal Employers' Liability Act, as construed and applied by the federal courts, has conferred upon any person asserting a cause of action under such act a federal right to bring the action in a District Court of the United States in the district in which the defendant may be doing business at the time of commencing such action; and has imposed upon such District Court the duty of accepting jurisdiction of such action. Consequently when a state court, as in the instant case, attempts to enjoin a litigant from prosecuting his cause of action, arising under the Federal Employers' Liability Act, in a District Court of the district in which the defend-

ant is doing business, such action, if effective, destroys a federal right of the litigant and obstructs the performance of a duty imposed by act of Congress upon a District Court of the United States. This is beyond the power of a state." (8 N. E. (2d) 986, 991.)

Were the legislature of the State of Ohio to declare a series of equity principles governing its Courts and legislate to the effect that no person resident in Ohio could bring suit for the recovery of personal injuries in any district other than in the State of Ohio, unquestionably such legislation insofar certainly as it conflicted with the Federal Employers' Liability Act would be unconstitutional. See *Atcheson, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695. *Certainly the equity powers of a state court can not rise above the rights of the State itself in the exercise of its full sovereign power. McConnell v. Thomson, supra.*

Claims of Incidental Burden on Interstate Commerce, Inconvenience, Hardship and Expense Are of No Avail to Petitioner.

Congress has the power to impose incidental burdens on interstate commerce in the creation of clear, unequivocal rights validly enacted. In *Southern Ry. v. Cochran, supra*, the Court says:

"It must be borne in mind that Congress has the power to regulate interstate commerce. The states have no such power. *If the effect of a federal statute conferring jurisdiction upon a federal court is to place a burden upon interstate commerce, the power for that purpose exists, and the remedy is legislative and not judicial.* (Italics ours.) The precise question here presented was considered by the Circuit Court of Appeals for the Eighth Circuit in *Schendel v. McGhee, District Judge*, 300 F. 273, 278. It was there said: 'We assume Congress could provide that actions in the federal courts should be brought at places where the same would not constitute a burden on commerce, but Congress has not done so. * * *' "

See also *Hoffman v. State of Missouri*, 274 U. S. 21; 71 L. Ed. 905, 47 Sup. Ct. Repr. 285; *D. & R. G. R. Co. et al. v. Terte*, 284 U. S. 284, 76 L. Ed. 295; 52 Sup. Ct. Repr. 152; *Hoch v. Byram et al.*, 230 N. W. 826; *Wood v. D. & H. Ry.*, 63 Fed. (2d) 235; *C. & O. v. Vigor, supra.*

In the *Hoffman* case, *supra*, the cause of action arose at Wichita, Kansas, and suit was brought in Sedalia, Missouri. This Court said:

> "* * * Even a foreign corporation is not immune from the ordinary processes of the courts of a state, where its business is entirely interstate in character. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

Inconvenience, hardship and extra expense have been pointed out clearly not to constitute grounds for the issuance of injunctive relief in many cases akin to the instant case. See *D. & R. G. R. Co. et al. v. Terte, supra; Hoffman v. State of Missouri, supra; C. & O. v. Vigor, supra; So. Ry. v. Cochran, supra; Connelly v. Central R. R. Co. of N. J., supra; Trapp v. B. & O. supra; Wood v. D. & H. Ry. Co., supra, Lancaster v. Dunn*, 95 So. 385; *C. M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N. W. 218; *So. Pac. v. Baum*, 38 Pac. (2d) 1106; *C. M. & St. P. Ry. Co. v. Schendel, supra.* In the *Terte* case, *supra*, this Court said:

> "Further as a practical matter courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses, or refuse jurisdiction according to the relative inconvenience of the parties."

It is perhaps not inappropriate to point out also that the new Federal Rules for the District Courts have eliminated most elements of potential surprise and afford an opportunity to narrow the issues and for each side to be

apprized fully of the nature of the proof to be offered by the other side. Nor has this opportunity gone entirely unavailed of in the instant case.

III.

THE CASES CITED BY THE PETITIONER IN SUPPORT OF ITS CONTENTIONS ARE CLEARLY DIFFERENTIATED FROM OR INAPPLICABLE TO THE INSTANT CASE.

Of the reported decisions in which injunctive relief was allowed, only one (*B. & O. v. Boles, supra*) was an instance where the employee had filed his action in a federal court. The *Boles* opinion by an inferior District Court on a motion for a temporary injunction, in an ex parte hearing, has been discussed on page 3 of this brief. Every other such case cited by petitioner is not in point, for in each the suit by the employee was in a state court and not in a federal court. Into this category fall the Indiana cases cited by petitioner, all of which are differentiated from the instant case by the Supreme Court of Indiana in *McConnell v. Thomson, supra.*

In *Chicago, M. & St. P. Ry. Co. v. McGinley, supra,* the suit of the employee was in a state court but the injunction sought was denied. *Davis v. Farmers' Cooperative Co.,* 262 U. S. 312 was not a Federal Employers' Liability Act case. It involved an action filed in a state court under color of a state statute in a state where the company did not own or operate any railroad, but only maintained an agent for the solicitation of traffic. The *Davis* case has been readily differentiated by this Court from situations more nearly akin to the instant case in *State of Missouri, etc. v. Taylor, supra; Hoffman v. State of Missouri, etc., supra; D. & R. G. R. Co. v. Terte, supra* and *International Milling Co. v. The Columbia Trans. Co.,* 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396.

Douglas v. N. Y., N. H. & H. R. Co., supra, was a case in which this Court held that nothing in the Act of Congress

purported to force a duty upon a state court to assume jurisdiction of an action under the Federal Employers' Liability Act as against an otherwise valid excuse. This Court pointed out that

> "it may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty."

But a federal court in a district in which the defendant is doing business is given no discretion with reference to the exercise of its jurisdiction (*Second Employers' Liability Act* cases, *supra*). It is readily apparent that the *Douglas* case lends no support to petitioner's contentions.

In *Michigan Central R. R. Co. v. Mix*, 278 U. S. 492, 73 L. Ed. 470, the suit was brought by the employee in a state court and not in a federal court in a district in which the defendant was doing business. This case falls into the category of the Indiana cases differentiated from the *McConnell* case, *supra*.

Another group of cases cited by petitioner on pages 25 and 26 of its brief concern themselves with matters with reference to which Congress has not undertaken to legislate. Chief Justice White in *S. A. L. Ry. Co. v. Kenney*, 240 U. S. 489, cited by petitioner in this group of cases, points out significantly at page 497:

> "There can be now no question that the Act of Congress, insofar as it deals with the subjects to which it relates, is supreme and exclusive."

Maurer v. Hamilton, 309 U. S. 598 and *Reid v. Colorado*, 187 U. S. 137, are not authority opposed to respondent's position. The Congressional intent in the enactment of Section 6 of the Federal Employers' Liability Act is clear and unequivocal and the statutory purpose would be frustrated and nullified were a state court possessed of the power of life or death over the exercise of the rights therein granted.

Bryant v. Atlantic Coast Line Ry. Co., 92 Fed. (2d) 569, did not involve the question here presented. In that case it was held only that the Federal District Court had no jurisdiction to enjoin an action in the state court of Virginia, so long as that action did not disturb the Federal Court's jurisdiction. The Court pointed out clearly that the remedy of Bryant was to contest the Virginia action and to appeal from any Virginia decision. The Court, in the *Bryant* case, refers to Sec. 379 of Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265, which provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

On page 570, the Court says:

> "That this section covers the situation, literally admits of no debate."

It must be apparent, therefore, that the *Bryant* case did not intend to become and is not to be considered as authority for the proposition urged by plaintiff.

As the opinion in the Ohio Supreme Court in the instant case puts it (R. 43):

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the state court of Virginia to enjoin the plaintiff from prosecuting his action in the federal court, but held that the District Court was right in not issuing a counter injunction against the defendant in prosecuting its injunction suit in Virgina."

Steelman v. All Continent Co., 301 U. S. 278, involved the power of a court of bankruptcy to enjoin the prosecution of a suit in another federal court upon the ground that the suit, if pressed to a decree, would thwart an inquiry into frauds charged against the bankrupts, or make relief against them difficult. The Court pointed to the provisions

of the Judicial Code, and to the Bankruptcy Act itself, enforcing the authority given by the Judicial Code. Such act invests courts of bankruptcy with jurisdiction at law and in equity to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of the act. The Court, referring to these statutes, points out that the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a court of bankruptcy. The situation in the *Steelman* case is entirely different from that in the case at bar and cannot, in any sense, be construed to warrant injunctive relief against the exercise of a substantive right granted by valid legislative act of Congress. To grant such injunctive relief would destroy and impair to all intents and purposes the admitted mandatory jurisdiction of a federal court with similar jurisdiction, which, in point of fact in the *Steelman* case, the Court regarded as so important as to warrant injunctive relief against action by the individual which would interfere with such jurisdiction.

IV.

OTHER CLAIMS OF PETITIONER ARE ERRONEOUS.

In a somewhat frantic effort to find a peg on which to hang its contentious hat, petitioner makes the claim on page 27 of its Brief that Congress did not intend "the district in which the defendant shall be doing business at the time of commencing such action" to mean any district in which the defendant shall be doing business, because the word "any" is not used. Petitioner's wish thinking would pervert the plain meaning of the language of the Act by adding to the clause "the district in which the defendant shall be doing business," a clause substantially like this "and which best suits the convenience of the defendant." Fortunately for railroad employees engaged in interstate commerce the Congress and not the petitioner still makes the laws applicable to them. In the light of the historical back-

ground of the Federal Employers' Liability Act and of Section 6 particularly it is difficult indeed to take seriously the petitioner's contention in this respect. All of the authorities are unanimous in deeming jurisdiction proper and mandatory in any district in which the defendant shall be doing business. See *C. & O. v. Vigor, supra*, where the Court approves an employee's right to institute his action "in any district" (Syllabus, 4th Paragraph). And see *C. M. & St. P. v. Schendel, supra*, where the Court speaks of the "bald fact that the right existed * * * to bring the case * * * *in any district* where appellant was doing business." See also *Moore v. C. & O., supra*. The emptiness of this frivolous contention is but a fair reflection of the paucity of substance in the petitioner's case.

Petitioner's argument that no distinction ought to be drawn between an action brought in a state court and one brought in a federal court is bottomed on the erroneous notion that Article IV, Section 2 of the Constitution of the United States alone governs an employee's right to sue in a state court and that to enjoin such an action is to violate Article IV, Section 2. Article IV, Section 2 requires only that a state confer on the citizens of the several states all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances (*Cole v. Cunningham*, 133 U. S. 113); that is, one state, when, for instance, establishing regulations for the conduct of private business of a particular kind, can not give its own citizens essential privileges connected with that business which it denies to citizens of other states (*Blake v. McClung*, 172 U. S. 252). Article IV, Section 2 clearly does not profess to control the power of the state governments over the rights of its own citizens (*Slaughter House Cases*, 16 Wall. 77; *Detroit v. Osborne*, 135 U. S. 492; *McKane v. Darston*, 153 U. S. 687). Thus if a state court undertakes to enjoin one of its own citizens it cannot be said to be violating the privileges and immunities clause of the United States Constitution. The right to bring an action in

a state court, applicable alike to the citizens of the several states, springs from the constitutional and statutory provisions of the state which establishes the Court and defines its powers (*Roberts Federal Liabilities of Carriers*, 2nd Edition, Vol. 2, p. 1856).

CONCLUSION.

In *C. M. & St. P. R. Co. v. Schendel, supra*, at page 239, the Court says:

> "It is difficult to take seriously, in this day of our national history, the proposition that a state can be permitted so to destroy the power of a federal court to carry on the work given to it under the acts of Congress. If witnesses, by order of a state court, can be prevented from testifying in a federal court, then the federal court is a mere shell to be crushed by the pressure of the state court injunction. *If a state can compel a citizen to give up one federal right as a prerequisite to bringing suit in a federal court, it can compel him to give up all federal rights. It is a proposition fraught with amazing consequences.*" (Italics ours.)

Were the petitioner's contentions to be allowed we should have a situation so chaotic as to tear down and nullify the structure of the Federal Employers' Liability Act so clearly intended to be constructed in the interest of the employee. Uncertainty and disadvantage would replace definiteness and benefit to the employee inherent in any authorized jurisdiction. That which the Congress intended to be a substantive right reposed in the emplo would be distorted into a boomerang which would strip him of any worthwhile power to exercise the right intended to be granted to him, and render him instead subject to the convenience of the employer and the fancies and predilections, perhaps, of varying concepts of different courts of equity. In each instance in which the employee, under such circumstances, undertook to sue his employer in a court not to the employer's liking, the employee would face the dreary prospect of two suits with all the attendant expense

and delay incidental thereto. Instead of a prompt disposition of the claims of the employee or his dependents in case of his death, there would be delay and almost insurmountable obstacles. Delay operates to the advantage of the defendant. The net result would be to mutilate Section 6, distort the purpose of the Act and deprive a citizen of the United States of a privilege specially intended for him and vest it indeed in the very defendant company against whom the privilege was intended to be lodged.

The contentions urged by the petitioner are patently unsound. Congressional power over interstate commerce is exclusive and plenary. No state court can destroy the valid exercise of this legislative power. The very statement of the petitioner's claim rebels against its acceptance.

The instant suit already has operated for almost a year to delay the trial of the respondent's action on its merits. In this delay is found the true purpose of the instant suit. The harassment, annoyance and vexation in this case have been on the foot of the petitioner and it has kicked persistently and viciously in its effort to protract the litigation and delay that day of reckoning when it must account to the respondent in a court of law for the injuries occasioned him through petitioner's culpable negligence.

Most earnestly do we beseech this Court speedily to deny the instant petition. The disposition of respondent's claim on its merits has been too long delayed. Exercise of the right which Congress vested in the respondent has been frustrated. Such frustration ought not longer to be countenanced. The petition for certiorari should be denied.

Respectfully submitted,

EDWARD M. BALLARD,
GEORGE METZGER,
BORDEN AND GAINES,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 678.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

EDWARD M. BALLARD,
GEORGE METZGER,
Gwynne Building,
Cincinnati, Ohio,

SAMUEL T. GAINES,
National City Building,
Cleveland, Ohio,
Counsel for Respondent.

BORDEN AND GAINES,
EDWARD M. BALLARD,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 678.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

STATEMENT OF ISSUE.

Section 6 of the Federal Employers' Liability Act provides:

> "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291, 45 U. S. C. Section 56.)

The respondent, an Ohio resident in petitioner's employ, was injured while engaged in interstate commerce. His action to recover damages for such injuries is brought under the Federal Employers' Liability Act. Section 6

of the Act, quoted above, permits the respondent's action to be brought in a District Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. No language qualifying or limiting such choice of a District Court thus vested in respondent is contained in the Act. The respondent chose to file his action in the District Court for the Eastern District of New York, in which district the petitioner admittedly was doing business at the time of commencing such action. No objection is raised to the jurisdiction of such District Court. (Petitioner's Brief, p. 40.)

The petitioner contends, however, that the choice of a District Court vested in the respondent by Section 6 of the Act must be exercised by him in coincidence with and subject to an alleged rule of Ohio law which would permit an Ohio state court of equity to enjoin the respondent in such choice of a District Court in which to bring his action when thereby the petitioner is caused much greater inconvenience and expense than would be the case were respondent to choose a District Court in some other jurisdiction likewise rendered available to him by the Act.

Assuming first, that in the instant case the demurrer interposed by the respondent in order to test the sufficiency in law of the petition filed against him, admits such allegations contained therein as would permit an Ohio court of equity to invoke such alleged Ohio law were it properly applicable to the respondent in the prosecution of his action under the Federal Employers' Liability Act, we submit that the contention of the petitioner is erroneous and untenable.

MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE.

The petitioner, in its statement of the case and at several points in its brief, refers to an allegation of conspiracy "to bring the action at a distant point for the purpose of annoying, harassing and vexing the petitioner without a sound and proper purpose of reasonably prosecuting any right of action that the respondent had against the petitioner," * * * a proceeding which it claims "would result in no benefit to the respondent" as "admitted by the demurrer of respondent to be true." Such assumption by the petitioner is inaccurate and unwarranted, both in fact and in law.

No facts constituting any such alleged conspiracy are stated in the petition or in the supporting affidavits filed in the instant case. The mere allegation of conspiracy as contained in the petitioner's petition is a mere conclusion of law. (*Kiser v. Motion Pictures Machine Operators' Union*, 26 O. App. 284, 159 N. E. 494.) A demurrer admits only such facts as are well-pleaded and does not admit the correctness of any conclusions of law. (*Pittsburgh, C. & St. L. R. Co. vs. Moore*, 33 O. S. 384, 31 Am. Rep. 543; *Mitchell v. Franklin County*, 25 O. S. 143.) The demurrer interposed by the respondent admits only such well-pleaded facts as are contained in the petition, solely for the purpose of testing their sufficiency in law. (*Seibert v. Herring*, 121 O. S. 181, 167 N. E. 383; 21 *Ruling Case Law*, pp. 509, 510.) The "syllabus" read in the light of the facts as stated in the opinion "states the law of the case." (Petitioner's Brief, 9.) The law of the state is that contained in the decision of its court of last resort. (*Erie R. Co. v. Tompkins*, 304 U. S. 64.)

The Ohio Supreme Court states clearly in its opinion (R. 25) and in the syllabus of the instant case the facts admitted by the demurrer interposed by the respondent. Nowhere, either in the opinion or the syllabus, does it ap-

pear that the demurrer admitted any such mere allegation of conspiracy as stated by the petitioner. Both the opinion and the syllabus of the Ohio Supreme Court in the instant case show clearly that the demurrer raised the legal sufficiency of the factual allegations with reference to inconvenience and expense. The petitioner does not specify that the Supreme Court of Ohio erred in construing the demurrer to admit only these facts for the purpose alone of testing the legal sufficiency thereof. Though the petitioner states, as a mere conclusion of law, that the respondent has filed his suit without a sound and proper purpose of reasonably prosecuting his right of action in the District Court which the respondent chose, it is significant that in its brief the petitioner makes repeated references to the medical witnesses as "highly important" and the nature and extent of the injuries as stated in the respondent's petition for damages (R. 6) give indication that the petitioner fears not that the respondent will fail to prosecute his cause of action, but that on the contrary he will reasonably and vigorously prosecute such right of action arising by reason of the severe injuries sustained by him.

The allegation of conspiracy, as revealed in the instant case, simmers down to this: That as between several forums made available to him by a positive, clear, vested right of choice, the employee under the Federal Employers' Liability Act chooses one which he may believe offers some remedial advantage, whether it be an opportunity to have the trial of his cause accelerated and thus disposed of without the delay which a crowded docket in another forum may present, or an opportunity to have the merits of his cause determined in an urban as against a rural community or whatever other remedial advantage may to him appear to exist.

For a citizen of the United States thus to invoke a right created by an admittedly valid and constitutional enactment of the Congress of the United States, acting in

that realm of power in which the Constitution of the United States makes its action supreme and exclusive, and designed for his benefit, we submit, certainly is not to do an unlawful thing or to accomplish a lawful purpose by unlawful means.

Were any further proof needed to show that the petitioner's references to an alleged conspiracy and the other mere conclusions of law are entirely unwarranted and alien to the issue in this case, it is to be found in the petitioner's own statement of the questions involved in the instant case as appears on pages 9 and 10 of the petitioner's brief. There one finds absolutely no reference to any alleged "conspiracy." No conspiracy existed; none is admitted. The question and the only question here involved is whether or not the Supreme Court of Ohio erred in its statement of the law found in the syllabus quoted on page 9 of the petitioner's brief, namely:

> "The State courts of this State cannot, in the exercise of their equity powers, enjoin a resident of the State from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a Federal Court of another State having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this State, and even though its prosecution in the Federal Court of another State may cause great inconvenience and expense to the defendant."

SUMMARY OF ARGUMENT.

I. (A) The power of Congress over interstate commerce is supreme, plenary, exclusive, complete in itself, and not to be hampered by the action of the states or state courts. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Second Employers' Liability Act Cases*, 223 U. S. 58; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501; *Wilson v. New*, 243 U. S. 332; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

(B) Laws of the United States made in pursuance of federal constitution are supreme law of the land binding

judges in every state. *Robb v. Connolly*, 111 U. S. 637; Article VI, Clause 2—Constitution of the United States.

(C) State regulations and laws are invalid (a) if in conflict with an express regulation by Congress (b) if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action (c) where federal regulation has occupied the field. *Kelly v. Washington*, 302 U. S. 1.

(D) Federal Employers' Liability Act drew to itself right of action for injuries or death of employee within its purview and such action under the Act must be brought as prescribed in it. *Moore v. C. & O.*, 291 U. S. 205; *Breisch v. Central Railroad of N. J.*, No. 384 U. S. Supreme Court, decided March 3, 1941; *S. A. L. Ry. Co. v. Kenney*, 240 U. S. 489.

(E) The right in respondent to sue in Federal District Court in the district where petitioner is doing business is clear and unqualified and compels such Court to assume jurisdiction. *Moore v. C. & O., supra*; *So. R'way v. Cochran*, 56 F. (2d) 1019; *Rader v. B. & O.*, 108 F. (2d) 980; *C. M. & St. P. R. Co. v. Schendel*, 292 F. 326; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55.

II. Nothing in either the plain language or the history of Section 6 of the Federal Employers' Liability Act sustains contention that right to invoke a federal court's jurisdiction therein provided is subject to the equity powers of a state court.

(A) The language is clear, direct, unqualified and unambiguous and its obvious meaning controls. *Railroad Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 588, 589; *Kuchner v. Irving Trust Co.*, 299 U. S. 445, 449.

(B) History of Act shows intent to enlarge rights and privileges of employees.

(1) Successive enactments rendering recovery easier of accomplishment; extending statute of limitations.

(2) Report 432 from Committee on the Judiciary pointing out that situation existing before Section 6 was enacted was a "grave injustice to the plaintiff," and purpose of the statute was to "extend and enlarge the remedy provided by law to employees."

(C) The wisdom or lack of wisdom in the enactment of Section 6 is not a matter for judicial appraisal. *U. S. v. Darby*, 61 S. Ct. 451; *McCray v. U. S.*, 195 U. S. 27; *Sonzinsky v. U. S.*, 300 U. S. 506, 513; *Veazie Bank v. Fenno*, 8 Wall. 533; 8 *Ohio Jurisprudence* 132.

(D) Right of employee is one to sue in "any" federal Court having jurisdiction. *Moore v. C. & O., supra; C. & O. v. Vigor*, 90 F. (2d) 7; *C. M. & St. P. v. Schendel, supra.*

III. Discussion of Authorities Cited by Petitioner.

B. & O. v. Inlow—overruled and discountenanced in *B. & O. v. Kepner*, 137 O. S. 409.

B. & O. v. Bole, 31 Fed. Supp. 221; overruled in *B. & O. v. Clem*, by same Court. Opinion of *Clem* case, Appendix A.

Ex Parte Crandall, 53 F. (2d) 969—not in point, action of employee filed in state court; any authority claimed for it by petitioner being dissipated by decision by same Circuit Court of Appeals in *Rader v. B. & O.*, 108 F. (2d) 980.

So. R'way v. Painter—Injunction by state court in ex parte hearing, held void in *Painter v. So. R'way*, 117 F. (2d) 100.

Bryant v. A. C. L. R. Co. 92 F. (2d) 569 concerned right of federal court to enjoin a state court which was not disturbing the federal court's jurisdiction, federal court action based on statute prohibiting injunction to stay proceedings in any state court.

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such

injunction may be authorized by any law relating to proceedings in bankruptcy." Sec. 379, Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265.

Douglas v. N. Y., N. H. & H. R. Co., 279 U. S. 377. Suit of employee brought in state court. The Federal Employers' Liability Act does not purport to compel a state court to assume jurisdiction as against an otherwise valid excuse. But this Court has held consistently that jurisdiction of federal court under the Act is mandatory.

Cases where injunctive relief was granted.

(1) Where employee sued in State Court.

(a) Indiana cases differentiated by Indiana Supreme Court in *McConnell vs. Thomson*, 213 Ind. 16.

(b) *Mich. Cent. v. Mix*, 278 U. S. 492.

(2) Cases other than Federal Employers' Liability Act cases.

(a) *Davis v. Farmers' Cooperative Co.*, 262 U. S. 312, differentiated in *State of Missouri v. Taylor, infra; Hoffman v. State of Missouri, infra; D. & R. G. R. Co. v. Terte, infra; International Milling Co. v. The Columbia Trans. Co.*, 292 U. S. 511.

IV. View of the petitioner that Article IV, Section 2 of the Constitution of the United States may be said to be violated where state enjoins suit by its own citizen in another state is bottomed on failure to understand that said Article IV, Section 2 does not govern the relationship between a state and its own citizens and requires only that a state not discriminate as against citizens of another state. *Slaughter House Cases*, 16 Wall. 77; *Cole v. Cunningham*, 133 U. S. 107.

V. Petitioner's claims concerning inconvenience are exaggerated. New rules governing procedure in federal district courts afford opportunity to eliminate element of surprise, narrow issues and even opportunity for summary judgment.

VI. Authorities in Opposition to Petitioner's Claims. *C. M. & St. P. v. Schendel, supra; C. & O. v. Vigor, supra; So. R'way v. Cochran*, 56 F. (2d) 1019; *McConnell v. Thomson, supra; Schendel v. McGhee*, 300 F. 273, 278; *Trapp v. B. & O.*, 283 F. 655; *Connelly v. Central R. R.*, 238 F. 932; *Norris v. Ill. Central*, 18 F. (2d) 584; *Rader v. B. & O., supra; Wood v. D. & H. R'way*, 63 F. (2d) 235; *Painter v. So. R'way, supra.*

VII. The Ohio Court had no jurisdiction of the subject of the action after District Court jurisdiction attached.

(a) Grant of concurrent jurisdiction gives plaintiff choice of court. As an incident he is entitled to whatever remedial advantage inheres in the particular forum. *M. & St. L. R. R. Co. v. Bombolis*, 241 U. S. 211; *Mo. etc. v. Taylor, supra*; 21 *C. J.* (Secundum) 807.

(b) State Court without power to arrest jurisdiction of federal court. *Sharon v. Terry*, 36 F. 337, 355; *Wallace v. McConnell*, 13 Pet. (U. S.) 138, 151; *Terral v. Burke Construction Co.*, 257 U. S. 532; *Pennsylvania Casualty Co. v. Pennsylvania*, 294 U. S. 189, 197; *Riggs v. Johnson County*, 6 Wall. (73 U. S.) 166.

Steelman v. All Continent Corp., 301 U. S. 278. Injunction allowed by federal court where its jurisdiction under bankruptcy act was likely to be thwarted by filing of other suit. This case, in fact, would seem to support the view that the jurisdiction of the federal court for the Eastern District of New York should likewise be protected from a state court of equity which by injunction, to all intents and purposes, would impair jurisdiction of federal court and nullify Section 6.

Injunction against the respondent would in effect be an injunction against the Federal District Court. *Hill v. Martin*, 296 U. S. 393, 403; *Oklahoma Packing Co. v. Oklahoma G. & E.*, 309 U. S. 4, 9; *Painter v. So. R'way, supra.*

Federal Court has inherent right to protect its proper jurisdiction against impairment and interference and hence

state court is without jurisdictional power where effect of state court action is to interfere with federal court jurisdiction already acquired. *Kline v. Burke Construction Co.*, 260 U. S. 226, *Looney v. Eastern Texas Co.*, 247 U. S. 214; *Essanay Film Co. v. Kane*, 258 U. S. 358, 361.

ARGUMENT.

I. INTERSTATE COMMERCE POWER OF CONGRESS VALIDLY EXERCISED IS SUPREME, PLENARY, EXCLUSIVE AND UNASSAILABLE.

Article I, Section 8 of the Constitution of the United States vests in the Congress of the United States a power over interstate commerce which is supreme, exclusive, plenary, complete in itself and not dependent on and not to be hampered by the action of the states. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; *Savage v. Jones*, 225 U. S. 501, 533, 56 L. Ed. 1182, 1195, 32 Sup. Ct. Rept. 715, 726; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501, 34 Sup. Ct., 635, 638 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475); *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 41, 36 Sup. Ct. 483, 60 L. Ed. 874; *Second Employers' Liability Act Cases*, 223 U. S. 58, 32 Sup. Ct., 169, 178, 56 L. Ed. 327; *Northern Pac. R. Co. v. Washington*, 222 U. S. 370; *Mo. Pac. R. Co. v. Porter, et al.*, 273 U. S. 341; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893.

In *Robb v. Connolly*, 111 U. S. 637, Justice Harlan said:

> "Upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whever those rights are involved in any suit or proceeding before them, for the judges of the state courts are required to take an oath to support that Constitution and they are bound by it and the

laws of the United States made in pursuance thereof, and all treaties made under their authority as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding' (Article VI, Clause 2 of the Constitution of the United States)."

This Court, recently, in *Kelly v. Washington*, 302 U. S. 1, discussed at some length the validity of state regulations or laws affecting interstate commerce. In the *Kelly* case there was before this Court the validity of state regulations providing for inspection of the hull and machinery of certain motor-driven tugs concerning which no provision of the federal laws were applicable. The state court had held that Congress had occupied the field and that no room was left for any state action in relation to vessels plying on navigable waters within the control of the federal government. This Court found the state regulation however to touch "that which the federal laws and regulations have left untouched" and that there was "plainly no inconsistency with the federal provisions." The syllabus (4) points to the instances where state regulation affecting interstate commerce is invalid. These are there stated to be (a) if in conflict with an express regulation by Congress; (b) if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action; and (c) where federal regulation has occupied the field.

Cases referred to by petitioner and by the Court in the *Kelly* case, *supra*, where state regulations or laws affecting interstate commerce have been held valid, were instances which did not fall into one or another of the categories referred to above. Thus in *Reid v. Colorado*, 187 U. S. 137, the Federal Act went no further than to make it an offense against the United States for one knowingly to take or send from one state to another live stock affected with infectious or communicable disease. The state statute required a certificate that the cattle were free from disease,

irrespective of shipper's knowledge of the actual condition of the cattle. It was held that the state statute did not cover the same ground as the Act of Congress and was not inconsistent with it.

Savage v. Jones, 225 U. S. 501, was a case in which an Indiana statute required a statement of the formula of ingredients of concentrated commercial food for stock. Such statute was held not repugnant to the Food and Drug Act of 1906 which dealt with the subject of adulterated and misbranded foods and defined misbranding. The Federal Act did not require a disclosure of ingredients though it covered any false or misleading statements as to ingredients. It was held that the state statute dealt with the omitted matter and did not impair the operation of the Federal Act as to matters with which such Act dealt.

In *Mintz v. Baldwin*, 289 U. S. 346, the state law required certification by the chief sanitary official of the state of Oregon that the cattle brought into the state for dairy or breeding purposes and also the herds from which they came are free from Bangs disease. The Cattle Contagious Disease Act of 1903 provided for regulation by the Secretary of Agriculture in order to prevent spread of the disease among cattle and live stock and when an inspector of the Bureau of Animal Industry certified that he had inspected the cattle and found them free from communicable disease they were permitted to be transported "without further inspection," but this Court held that the express exclusion of state inspection extended only to cases where there had been federal inspection and a certificate had been issued and that, therefore, such exclusion of state inspection could not be extended to a case where the cattle had not been inspected and certified by federal authority.

A Pennsylvania statute which prohibited the operation on the highways of that state of any vehicle above the cab of the carrier vehicle and applied to interstate carriers

was held, in *Maurer v. Hamilton, et al.*, 309 U. S. 598, to be consistent with the commerce clause. This Court pointed out that the Federal Motor Carrier Act of 1935 provided in Section 204 that the Interstate Commerce Commission was empowered to establish reasonable requirements with respect to safety of operation and equipment, but that its authority with respect to sizes and weights of the vehicles is expressly limited in Section 225 to investigation and report on the need of regulation, and this Court held the Pennsylvania statute to be a weight and size regulation within the meaning of said Section 225 and within the regulatory authority of the state reserved by that section from the authority granted to the Commission by Section 204.

The cases cited by petitioner on pages 13 and 14 of its Brief are all instances in which the state regulations or rules concerned matters about which Congress had not undertaken to legislate. Thus these cases are wholly inapplicable to an instance where Congress has expressly regulated the matter involved.

The exclusive, supreme and plenary character of Congressional power over interstate commerce, however, has been often stated and exemplified. Thus in *Northern Pac. R. Co. v. Washington, supra*, wherein was involved an act regulating the hours of labor of employees engaged in interstate commerce, this Court held that the Congress, by enacting a statute in regard to a subject within its exclusive power, emphasizes its purpose to call that power into effect and at once removes that subject from the sphere of state action.

In *Missouri Pac. R. Co. v. Porter, supra*, this Court said, at page 346:

> "its power (that of Congress) to regulate such commerce and all its instrumentalities is supreme and as that power has been exerted, state laws have no application. They cannot be applied in coincidence

with, as complementary to, or as in opposition to federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

This Court, in *Napier vs. Atlantic Coast Line R. R. Co.*, 272 U. S. 605, held the Boiler Inspection Act so to have occupied the field of regulating locomotive equipment on interstate highways that state legislation requiring cab curtains and automatic fire doors is precluded and such matters are left to the regulatory power reposed by the act in the Interstate Commerce Commission.

An action under the Federal Employers' Liability Act, this Court said in *Moore v. C. & O.*, 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755, at page 216:

"*must be brought as prescribed in the Federal Employers Liability Act.* * * * When the Act was enacted, it drew to itself the right of action for injuries or death of the employees within its purview who were engaged in interstate commerce."

Very recently in *Breisch v. Central Railroad of New Jersey*, No. 384, October Term, 1940, decided by this Court on March 3, 1941, it is said:

"The Federal Employers' Liability Act does give a right of action and fixes the tribunals where it may be enforced. *Moore v. C. & O.*, Sections 1 and 6, 45 U. S. C. 51, 56."

In *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 509, 36 Sup. Ct. 683, 689 (60 L. Ed. 1125) this Court said, apropos the employer's effort to invoke certain sections of the Idaho Code adverse to the employee's rights, that:

"Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield."

Certainly now there can be no question that the Federal Employers' Liability Act, insofar as it deals with the subjects to which it relates, is supreme and exclusive. See *S. A. L. Ry. Co. v. Kenny*, 240 U. S. 489.

Recently in *Hines vs. Davidowitz* (not yet reported), 61 S. C. R. 399, 410, where there was involved a state act regulating aliens, this Court held such regulation of aliens so intimately blended and intertwined with the responsibilities of the national government that where it acts and the state also acts on the same subject, the act of Congress or the treaty is supreme and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. This Court in the *Hines* case pointed out that "states cannot inconsistently with the purpose of Congress conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations."

In the instant case, then, the respondent governed by the Federal Employers' Liability Act has invoked a choice specifically vested in him by the Congress in clear, explicit and unambiguous language. He has chosen to file his action in the District Court for the Eastern District of New York. The Congress, having drawn to itself the right of action for injuries of such an employee as the respondent, made available to him such choice of jurisdiction. (*Moore v. C. & O., supra.*) The Congress fixed the tribunals where the respondent's action could be filed. (*Breisch v. Central R. of N. J., supra.*) The petitioner now seeks to thwart and frustrate such choice by invoking a state law of equity. If such injunction against the choice unqualifiedly provided for by Congress, be allowed, does it not directly conflict with and nullify the Congressional enactment? We submit that such state regulation of necessity is repugnant and contrary to and violates and interferes with an "express regulation by Congress." The state law under such circumstances, of necessity, must yield and be deemed inapplicable to the instant case.

In *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326, the first paragraph of the syllabus reads:

> "Under the Employers' Liability Act, Section 6, the * * * jurisdiction thus conferred on the Courts of the United States cannot be interfered with by a state, either through its Legislature or Courts, and a state statute which prohibits a citizen of a state from bringing an action under the Act in a Federal Court of a district in which the defendant is doing business, is unconstitutional."

Chief Justice Marshall in *Gibbons v. Ogden*, *supra*, phrased the law pertinent hereto as follows:

> "Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

Were the legislature of the State of Ohio to declare a series of equity principles governing its Courts and legislate to the effect that no person resident in Ohio could bring suit for the recovery of personal injuries in any district other than in the State of Ohio, unquestionably such legislation insofar certainly as it conflicted with the Federal Employers' Liability Act would be unconstitutional. See *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695. Certainly the equity powers of a state court can not rise above the rights of the State itself in the exercise of its full sovereign power. *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

At the risk of being repetitious, let us again refer to the following salient and dispositive factors. The respondent's cause of action is governed by the Federal Employers' Liability Act. Such Act by an express regulation by Congress

in clear, explicit and unambiguous language vests in the respondent a right to institute his suit in the District Court which he chose. Nothing contained in the Act limits or qualifies such exercise of choice. The District Court chosen was admittedly under a mandatory duty to assume jurisdiction of the respondent's action. (Petitioner's Brief, p. 29.) The Court cannot be concerned with the justice or the wisdom of Section 6. *Second Employers' Liability Act Cases*, 223 U. S. 58, 32 Sup. Ct., 169 178, 56 L. Ed. 327. *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755; *Schendel v. McGhee, District Judge*, 300 Fed. 273; *Norris v. Ill. Central*, 18 Fed. (2) 584; *Trapp v. B. & O.*, 283 Fed. 655; *Connelly v. Central R. Co. of New Jersey*, 238 Fed. 932; *So. Railway v. Cochran*, 56 Fed. (2d) 1019; *Wood v. D. & H. Ry. Co.*, 63 Fed. (2d) 235; *C. & O. v. Vigor*, 90 Fed. (2d) 7; *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986; *Rader v. B. & O. R. R. Co.*, 108 Fed. (2d) 980.

If the respondent in the exercise of that choice provided by express Congressional regulation, is to be made subject to a rule of Ohio law requiring him to minimize the inconvenience and expense caused the petitioner by such action, how can it be said that the Ohio law does not violate, curtail and interfere with the express Congressional regulation? To endow a state court with power to enjoin the respondent from prosecuting his action under the Federal Employers' Liability Act in a District Court in a district in which jurisdiction is expressly provided for in such Act is certainly irreconcilable with the doctrine of Congressional supremacy in the field of interstate commerce. Such state power if valid would render nugatory the express regulation by Congress, and what then becomes of the exclusive and plenary character of Congressional power over interstate commerce?

See *C. M. & St. P. R. Co. v. Schendel, supra*, at page 329, where the Court said:

"It is difficult to take seriously, in this day of our national history, the proposition that a state can be permitted so to destroy the power of a federal court to carry on the work given to it under the acts of Congress. If witnesses, by order of a state court, can be prevented from testifying in a federal court, then the federal court is a mere shell to be crushed by the pressure of the state court injunction. *If a state can compel a citizen to give up one federal right as a prerequisite to bringing suit in a federal court, it can compel him to give up all federal rights. It is a proposition fraught with amazing consequences.*" (Italics ours.)

II. NOTHING IN EITHER THE PLAIN LANGUAGE OF HISTORY OF SECTION 6 SUSTAINS PETITIONER'S CLAIMS.

The language of Mr. Justice Frankfurter in *Federal Trade Commission v. Bunte Bros.* (not yet reported), 61 S. C. R. 580, 582, cited by petitioner that "we ought not to find in Section 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated," suggests that it is the petitioner who in the instant case seeks to indulge in radiations far beyond the "obvious meaning of language." It seeks to read into an Act of Congress, language which is in conflict with and repugnant to the language actually used by Congress. The words employed by the Congress to express its intention ought certainly to be persuasive when such words are simple, plain and unambiguous. See *Railroad Commission vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588 589, 42 S. Ct. 232, 66 L. Ed. 371; *Standard Fashion Company vs. Magrane-Houston Co.*, 258 U. S. 346, 356, 42 S. Ct. 360, 66 L. Ed. 653; *Kuehner vs. Irving Trust Co.*, 299 U. S. 445, 449, 57 S. Ct. 298, 81 L. Ed. 340.

Is there anything in the legislative history of the Federal Employers' Liability Act which points to an intent or purpose on the part of Congress to serve the convenience of the employer defendant and to compel the employee to bring his action in a District Court in a district where it

would not result in greater inconvenience and expense to the defendant than in some other district?

We submit that the background of the Federal Employers' Liability Act shows a clear Congressional intent to liberalize the Act in favor of the employee. From time to time the rights and privileges of the employee under the Federal Employers' Liability Act have been enlarged and increased. One need only recall the abolition of the fellow servant rule, the provisions making contributory negligence a *pro tanto* defense, creating an absolute liability in Safety Appliance Act cases, finally abolishing entirely the defense of assumption of risk and extending from one year to two years and now to three years the statute of limitations.

Particularly with reference to Section 6, the language of which became a part of the Act by amendment in 1910, it is clear that such amendment was enacted for the benefit of the employee. Before the amendment was enacted, the only District Court in which an employee could institute his action under the Act was that District Court in the district of which the defendant employer was an inhabitant. (Sec. 51, Judicial Code.) This was true even if diversity of citizenship existed. Senator Borah reporting for the Senate Committee on the Judiciary pointed out that such a situation was "a grave injustice to the plaintiff." (Report 432 from the Committee on the Judiciary of the Senate to accompany H. R. 17263.)

Senator Borah's Committee Report, page 21, further declares the purpose of the Liability Act as follows:

> "it is important at the outset to understand that the purpose of Congress in this act was to extend further protection *to employees.* * * * It is manifest from a consideration of the reports, both of the Senate and House Committee, when the measure was pending before those bodies prior to its enactment *that the purpose of the statute was to extend and enlarge the remedy provided by law to employees.*" (Italics ours.)

The Congress was well aware that railroad lines extended over many hundreds of miles and Congress well knew that the language in the first sentence of Section 6 vested in the employee a choice of three distinct districts in which to institute his action. If Congress intended to make this choice conditioned upon matters of convenience and expense to the employer, it could easily have provided for such limitations. If Congress had intended to limit the choice of jurisdiction to be lodged in the employee to either the district in which the defendant resided, or in which the cause of action arose, the Congress could very readily have omitted the clause which provided that such suit may be filed in the district in which the defendant shall be doing business at the time such action is commenced. The obvious purpose of the entire Act and particularly of the first sentence of Section 6 was to enlarge a privilege vested in the employee. Certainly by no verbal gymnastics can one read into this historical background and the language employed any intent to subject the exercise of this privilege thus vested in the employee to the convenience of the employer.

The wisdom or lack of wisdom of the congressional enactment is not a matter for judicial appraisal. "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. (*U. S. v. Darby* (not yet reported), 61 S. C. R. 451, citing *McCray vs. U. S.*, 195 U. S. 27; *Sonzinsky v. U. S.*, 300 U. S. 506, 513.)

> "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." (*Veazie Bank v. Fenno*, 8 Wall. 533.)

In 8 *Ohio Jur.*, page 132, we find the statement that:

> "Although a Constitution should receive a liberal construction, equity cannot be permitted to override the Constitution. In determining constitutional ques-

tions, the judiciary should not attempt to solve them by reasoning only along the lines of the principles of equity, but the reasoning should be along the lines of the Constitution, for it may be that the very object of the Constitution is to abandon and cut loose from what had theretofore been regarded as equity in particular cases, or upon a particular subject matter. The question is, in the ultimate analysis, not what would be equitable, but what is constitutional. (*State ex rel. Schwartz v. Ferris*, 53 O. S. 314, 30 L. R. A. 218, 41 N. E. 579.) Clearly, whether a constitutional limitation is wise or unwise, it is not within the province of the court to eliminate it. (*Cleveland Teleph. Co. v. Cleveland*, 98 O. S. 358, P. U. R. 1919C, 136, 121 N. E. 701.)"

It is the petitioner's contention that Section 6 does not permit suit in any District Court having jurisdiction because the word "any" is not used. The contention reflects the weakness of petitioner's claims. Suffice it to say apropos thereof that no citation in support of such view is given for none exists. On the other hand the authorities indicate clearly the existence of the right to institute such suit under the Act in any District Court having jurisdiction. See *Moore v. C. & O., supra; C. & O. v. Vigor*, 90 Fed. (2d) 7, certiorari denied 302 U. S. 705, 58 S. C. R. 25, 82 L. Ed. 545; *Norris v. Illinois Central R. Co.*, 18 Fed. (2d) 584, and *C. M. & St. P. etc. v. Schendel, supra*, in which case the Court, at page 330, speaks of the "bald fact that the right existed * * * to bring the case * * * *in any* (italics ours) district where appellant was doing business."

III. DISCUSSION OF AUTHORITIES CITED BY PETITIONER.

Not a single court of last resort anywhere has sustained an alleged right to enjoin an employee from prosecuting an action under the Federal Employers Liability Act in a District Court in any district in which the defendant was doing business at the time of commencing the action.

B. & O. R. R. Co. v. Indow (Petitioner's Brief, 29) was an Ohio Court of Appeals' decision definitely overruled and discountenanced by the Ohio Supreme Court in the instant case.

B. & O. R. R. Co. v. Bole, 31 Fed. Supp. 221, was by a U. S. District Court in West Virginia. The injunction by the Court in that case was in an ex parte hearing concerning which we pointed out in our brief in opposition to the petition for certiorari that "as obvious as the fact that such Court had before it only the railroad company contentions is the fact also that the Court was not fully and correctly apprized of the applicable law." This observation is borne out by the fact that on January 15, 1941 in a case entitled *B. & O. R. R. Co. v. Clow*, Civil Action No. 21-M, District Court U. S., Northern District of West Virginia, the same Judge who ruled in the *Bole* case, but this time benefited by a fuller presentation of the applicable law, reversed himself and denied an injunction on the authority of *C. & O. Ry. Co. v. Vigor, supra*. The Court said in its opinion, attached hereto, as Appendix A.

> "However, at the time of the decision in the *Bole* case, the Court's attention was not directed to the decision of the District Court for the Southern District of Ohio, in the case of *C. & O. Ry. Co. vs. Vigor*, 17 Fed. Sup. 602, nor to that of the Circuit Court of Appeals for the 6th Circuit, affirming the same. See *C. & O. Ry. Co. vs. Vigor*, 90 Fed. (2) 7.
>
> " * * *. The *Vigor* case, above cited, appears to me to be directly in point.
>
> " * * * Under these circumstances I feel that I must follow the decision in the *Vigor* case and applying that decision to the facts before me, must refuse a temporary injunction, must dissolve the temporary restraining order, heretofore issued, and must dismiss the present action."

The petitioner refers also to *Ex Parte Crandall*, 53 Fed. (2d) 969, as if in that case the United States Circuit

Court of Appeals for the 7th Circuit seemed to sustain the petitioner's claims. In the *Crandall* case the right of a litigant under the Federal Employers' Liability Act to institute his suit in a district court of any district in which the defendant was doing business at the time such action was commenced, was not in issue in any respect and the Court specifically stated in its opinion:

> "whether the power of the state court to restrain would extend to the commencement of such suits in any federal court is not here involved."

More recently, the 7th Circuit Court of Appeals had before it the case of *Rader v. B. & O.*, 108 Fed. (2) 980, certiorari denied April 1, 1940, 309 U. S. 682. In that case an Ohio resident instituted his action under the Federal Employers' Liability Act in a state court of Illinois and then later in the United States District Court of Illinois. An Ohio state court issued an order against the claimant restraining his prosecution of the action in the state court and later in the federal court. But the Circuit Court of Appeals, page 985, said:

> "In the second place, we are convinced that even though the restraining order of the Ohio state court had included a restraint against the prosecution of the instant case, it would have been without force."

Syllabus 8 of the same case reads:

> "Ohio state courts had no power to enjoin federal court suit brought under Federal Employers' Liability Act, notwithstanding constitutional provision requiring due faith and credit to be given to judicial proceedings of various states."

Though the instant petitioner was a party litigant in both the *Clem* and *Rader* cases, *supra*, neither case, significantly, is referred to in petitioner's brief.

In *So. Ry. Co. v. Painter, Adm'x.*, 117 F. (2d) 100, the Circuit Court of Appeals for the 8th Circuit affirmed a District Court injunction restraining the Company from

prosecuting a suit instituted by it in a Tennessee State Court where it, in an ex parte hearing, obtained an order restraining its employee from suing in the District Court. This case follows *C. M. & St. P. R. Co. v. Scheidel, supra.*

Bryant v. Atlantic Coast Line Ry. Co., 92 Fed. (2d) 569, did not involve the question here presented. In that case it was held only that the Federal District Court would not enjoin an action in the state court of Virginia, so long as that action did not disturb the Federal Court's jurisdiction. The Court suggested that the remedy of Bryant was to contest the Virginia action and to appeal from any Virginia decision. The Court, in the *Bryant* case, refers to Sec. 379 of Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265, which provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

On page 576, the Court says:

> "That this section covers the situation, literally admits of no debate."

It must be apparent, therefore, that the *Bryant* case did not intend to become and is not to be considered as authority for the proposition urged by petitioner.

As the opinion in the Ohio Supreme Court in the instant case puts it (R. 43):

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the state court of Virginia to enjoin the plaintiff from prosecuting his action in the federal court, but held that the District Court was right in not issuing a counter injunction against the defendant in prosecuting its injunction suit in Virginia."

In the instant case the respondent did exactly what was pointed out in the *Bryant* case as being the proper procedure for the employee to take.

Douglas v. N. H. & H. R. Co., 279 U. S. 377, was a case in which this Court held that nothing in the Act of Congress purported to force a duty upon a state court to assume jurisdiction of an action under the Federal Employers' Liability Act as against an otherwise valid excuse. This Court pointed out that

> "it may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty."

But a federal court in a district in which the defendant is doing business is given no discretion with reference to the exercise of its jurisdiction (*Second Employers' Liability Act Cases, supra*). It is readily apparent that the *Douglas* case lends no support to petitioner's contentions.

The Indiana cases in which an employee was restrained from prosecuting his action in a state court are distinguished from the situation which arises when the employee invokes his right to choose a U. S. District Court in which to file his action, in *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986. The *McConnell* case held in the following pertinent syllabus:

> "1. A state court's equity powers are ineffectual against valid exercise of legislative power by United States Congress."
>
> "2. A state court cannot limit United States citizen's exercise of right conferred by valid act of Congress, since state itself in exercise of full sovereign power cannot limit or abridge such right."
>
> "3. An Indiana equity court had no power to enjoin Indiana citizen from prosecuting action in Federal Court of another state under Federal Employers' Liability Act, since such injunction would destroy federal right of litigant and obstruct federal court in performance of duty (Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 *et seq.*)."

The Supreme Court of Indiana reviews the law at considerable length and reaches the conclusion that:

"Congress can, and by the provisions of the Federal Employers' Liability Act, as construed and applied by the federal courts, has conferred upon any person asserting a cause of action under such act a federal right to bring the action in a District Court of the United States in the district in which the defendant may be doing business at the time of commencing such action; and has imposed upon such District Court the duty of accepting jurisdiction of such action. Consequently when a state court, as in the instant case, attempts to enjoin a litigant from prosecuting his cause of action, arising under the Federal Employers' Liability Act, in a District Court of the district in which the defendant is doing business, *such action, if effective, destroys a federal right of the litigant and obstructs the performance of a duty imposed by act of Congress upon a District Court of the United States. This is beyond the power of a state.*" (8 N. E. (2d) 986, 991.) (Italics ours.)

Akin to the Indiana cases differentiated in *McConnell v. Thomson, supra*, the cases of *B. & M. R. R. Co. v. Whitehead*, 29 N. E. (2d) 916; *Reed's Admx. v. Ill. Central R. R. Co.*, 182 Kentucky 455, 206 S. W. 794; *L. & N. R. Co. v. Rogan*, 172 Tenn. 593, 113 S. W. 743 and *C. M. & St. P. R. R. Co. v. McGinley*, 175 Wis. 565, 185 N. W. 218, are instances in which the suit of the employee was brought in the state court. None are in point here.

So, too, in *Michigan Central R. R. Co. v. Mix*, 278 U. S. 492, 73 L. Ed. 470, the suit was brought by the employee in a state court and not in a federal court in a district in which the defendant was doing business.

Davis v. Farmers' Cooperative Co., 262 U. S. 312 was not a Federal Employers' Liability Act case. It involved an action filed in a state court under color of a state statute in a state where the company did not own or operate any railroad, but only maintained an agent for the solicitation of traffic.

The *Davis* case was differentiated in *State of Missouri v. Taylor*, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. 200, in which case this Court said:

> "No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive right. *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 511, 35 S. Ct. 865, 59 L. Ed. 1433; *A. C. L. R. R. Co. v. Burnette*, 239 U. S. 199, 36 S. Ct. 75, 60 L. Ed. 226; *New Orleans etc. v. Harris*, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *Yazoo & Miss. Valley R. R. Co. v. Mullins*, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754."

In *Hoffman v. The State of Mo., etc.*, 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 905, this Court again differentiated the *Davis* case. Here the action was brought in a state court under the Federal Employers' Liability Act. The cause of action arose at Wichita, Kansas and suit was brought in Sedalia, Mo. This Court denied the applicability of the *Davis* case and said:

> "* * * Even a foreign corporation is not immune from the ordinary processes of the courts of a state, where its business is entirely interstate in character. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

This Court next construed the *Davis* case in *D. & R. G. R. Co. v. Terte*, 284 U. S. 284, 76 L. Ed. 295, 52 S. Ct. 152. There the plaintiff employee had sued the D. & R. G. R. Co. and the Sante Fe jointly in Missouri, the cause of action arising in Colorado. The D. & R. G. did not own or operate any line in Missouri. The Santa Fe did own and operate railroad lines in Missouri and did business there. The Court held that the Santa Fe was properly sued in the Missouri court even though its co-defendant was not and followed the *Hoffman* case, *supra*. In the *Terte* case the plaintiff claimed that his witnesses were residents of Mis-

souri and thus were more easily available to him there than they would be in Colorado. This Court apropos the matter of inconvenience as related to jurisdiction said:

> "Further as a practical matter courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses, or refuse jurisdiction according to the relative inconvenience of the parties."

See also *International Milling Co. v. The Columbia Trans. Co.*, 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396. There a suit between Delaware corporations was brought in Minnesota on a cause of action which arose in Illinois. This Court pointed out that the "forum being in other respects appropriate" the jurisdiction was not affected because the chief witnesses reside in other states.

IV. PETITIONER'S ARGUMENT THAT ARTICLE IV, SECTION 2, IS INVOLVED IN INJUNCTIONS AGAINST SUITS IN STATE COURTS IS ERRONEOUS.

Petitioner's argument that no distinction ought to be drawn between an action brought in a state court and one brought in a federal court is bottomed on the erroneous notion that Article IV, Section 2 of the Constitution of the United States alone governs an employee's right to sue in a state court and that to enjoin such an action is to violate Article IV, Section 2. Article IV, Section 2 requires only that a state confer on the citizens of the several states all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances (*Cole v. Cunningham*, 133 U. S. 113); that is, one state, when, for instance, establishing regulations for the conduct of private business of a particular kind, can not give its own citizens essential privileges connected with that business which it denies to citizens of other states. (*Blake v. McClung*, 172 U. S. 252.) Article IV, Section 2 clearly does not profess to control the power of the state governments over the rights of its own citizens. (*Slaughter House*

Cases, 16 Wall. 77; *Detroit v. Osborne*, 135 U. S. 492; *McKane v. Durston*, 153 U. S. 687.) Thus if a state court undertakes to enjoin one of its own citizens it cannot be said to be violating the privileges and immunities clause of the United States Constitution. The right to bring an action in a state court, applicable alike to the citizens of the several states, springs from the constitutional and statutory provisions of the state which establishes the Court and defines its powers. (*Roberts Federal Liabilities of Carriers*, 2nd Edition, Vol. 2, p. 1856.)

V. PETITIONER'S CLAIMS CONCERNING INCONVENIENCE ARE PATENTLY EXAGGERATED.

The actual inconvenience which may be suffered by the petitioner, we submit, has been magnified many fold. The petitioner need fear no element of surprise. The respondent's claims are clearly set forth in his petition. The rules governing civil actions in Federal District Courts now eliminate any substantial element of surprise. Inquiry by depositions and interrogatories are available to the petitioner. It is the respondent who must first present his case. If he has no cause of action he will be non-suited. There is even available to the petitioner, if justified, an opportunity to dispose of the suit before trial by motion for a summary judgment: Rule 56(b). The new rules contemplate that the element of surprise be minimized if not completely eliminated. Agreement as to what issues exist between the litigants is possible. Magnifying the inconvenience to which the petitioner will be subjected, however, can be of no avail if, as we submit, no state court has the power to deny to the respondent the exercise of the right vested in him by an express Congressional regulation of interstate commerce.

VI. AUTHORITIES IN OPPOSITION TO PETITIONER'S CLAIMS.

The utter absence of authority in support of petitioner's contention is not without significance. On the other hand the denial of petitioner's contentions by the many courts which have passed upon them is a compelling and significant fact.

Chicago, M. & St. P. Ry. Co. v. Schendel, supra, presented an effort on the part of an Iowa state court to restrain an action under the Federal Employers Liability Act in a U. S. District Court in Minnesota. An Iowa statute forbade the employee's action. The Circuit Court of Appeals held:

> "Under the Employers' Liability Act, Section 6, the * * * jurisdiction thus conferred on the Courts of the United States cannot be interfered with by a state, either through its Legislature or Courts, and a state statute which prohibits a citizen of a state from bringing an action under the Act in a Federal Court of a district in which the defendant is doing business, is unconstitutional."

The third paragraph of the syllabus in the *Schendel* case, *supra*, reads:

> "A court of equity may not enjoin the bringing of an action in another jurisdiction on the ground of hardship or inconvenience to defendant and witnesses where the right to sue in such other jurisdiction is given by law."

The Court discussing the conflict between the Iowa public policy, as expressed by statute, and the employee's right under Section 6 says at page 330:

> "The Iowa public policy cannot destroy this federal right. In a conflict between such policy and a federal right given to a citizen of Iowa, the public policy must yield. * * *"
>
> "* * * It (the Iowa statute) amounts to a nullification of the federal statute."

We submit that *C. & O. v. Vigor, supra*, is on all fours with the instant case. The pertinent syllabus of the 6th Circuit Court of Appeals reads:

"2. Railway company held not entitled to injunction against administratrix's prosecution of action against it for employee's death, in Federal Court for the district in which it is doing business, on the ground of inconvenience or extra expense in producing witnesses residing in another state, wherein deceased was injured and administratrix resided.

"3. Railway company held not entitled to injunction against prosecution of suit against it, for employee's death, in Federal Court for district of another state than that in which plaintiff and defendant's witnesses residing and deceased was injured, on the ground that defense of such suit would place unreasonable burden on interstate commerce.

"4. Congress, having power to regulate interstate commerce, may place incidental burdens thereon, by jurisdictional statutes, such as act authorizing filing of suit for damages, under the Federal Employers' Liability Act, in any district wherein defendant is doing business."

The briefs of both the petitioner and respondent in the *Vigor* case, *supra*, in this Court, indicate clearly that the question in that case was identical with the question raised by the instant petition.

"The lower courts regarded the Federal Employers' Liability Act, permitting the filing of the respondent's action in Hammond, Indiana, as controlling, and treated the said act of Congress as one inhibiting such a case as the railway company instituted for an injunction." Petitioner's Brief, page 9, *C. & O. v. Vigor* (U. S. Supreme Court) *supra*.

"The real question involved is whether or not the District Court of the United States for the Southern District of Ohio (Sixth Circuit) may enjoin respondent from prosecuting a suit in the District Court of the United States for the Northern District of Indiana (Seventh Circuit) to recover damages for the death of

her intestate under the provisions of the Federal Employers' Liability Act, it being admitted that deceased was engaged in interstate commerce at the time of his injury and that petitioner was doing business in the Northern District of Indiana at the time the suit was filed." Respondent's Brief, page 2, *C. & O. v. Vigor* (U. S. Supreme Court) *supra*.

The Court, in the *Vigor* case, *supra*, after indicating the grounds upon which the injunction was sought, namely "inequitable conduct on the part of the defendant, and imposition of an unconscionable hardship on the plaintiff, in the institution and prosecution of the action," says, on page 8:

> "The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in Court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held, in *Southern Railway Company vs. Cochran*, 56 Fed. (2d) 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a Court of equity, in enjoining its prosecution in the face of the statute, giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority and is controlling in the case at bar."

The *Cochran* case, *supra*, presented a situation where the suit in question was brought in the Federal District Court in Kentucky, and plaintiff resided in South Carolina, where the accident occurred and where all the witnesses allegedly lived. It was urged that the defendant was a Virginia corporation which would be obliged to transport about 15 witnesses 417 miles, and maintain them at the place of trial at a cost of about $2,000.00; that the railway witnesses were employed in interstate commerce, and that their absence from their place of employment

would place a burden on and unduly interfere with interstate commerce. The Court at page 1020 says:

> "Jurisdiction is here asserted by a court of the United States under the mandate of a federal statute. It must be borne in mind that Congress has the power to regulate interstate commerce. The states have no such power. *If the effect of a federal statute conferring jurisdiction is to place a burden upon interstate commerce, the power for that purpose exists, and the remedy is legislative and not judicial.* (Italics ours.) The precise question here presented was considered by the Circuit Court of Appeals for the Eighth Circuit in *Schendel v. McGhee, District Judge*, 300 F. 273, 278. It was there said: 'We assume Congress could provide that actions in the federal courts should be brought at places where the same would not constitute a burden on interstate commerce, but Congress has not done so. It has given the right under the Federal Employers' Liability Act, hereinbefore discussed, to an injured party, or in case of his death to the duly constituted representative, to maintain an action in the Courts of the district where the defendant is doing business at the time the suit is commenced. *We are not concerned with the justice or the wisdom of such legislation. It being the law, it is a court's duty, where there is jurisdiction, to take and retain that jurisdiction and try the case.*' " (Italics ours.)

In the *Trapp* case, *supra*, the plaintiff was a citizen and resident of the State of Indiana. The defendant was the same corporation which brings the instant complaint. The plaintiff, while employed by the defendant, was injured in Garrett, Indiana. He brought his action in the District Court for the Northern District of Ohio. The company appeared specially and moved to dismiss for want of jurisdiction. The Court said:

> "The language of the first sentence of the amendment is clear and explicit. It confers upon an injured employee the privilege of bringing his action in any one of three districts of the United States.

The privilege thus conferred is not controlled by nor dependent on the jurisdiction conferred by a state upon its local Courts."

"By the express terms of the law, plaintiff may bring his action in this district. The fact that he might also have brought it where the cause of action arose (that is, in Indiana), or in the district of the defendant's residence (that is, the State of Maryland) does not deprive him of his right to select also this district, where the defendant is doing business at the time of commencing such action. * * * That much inconvenience may arise from permitting an action to be brought, when the plaintiff and all the witnesses on both sides may reside in Maryland or Indiana, are considerations merely of convenience and can be given controlling weight by Congress alone, which has power to make or amend the law."

In the *Connelly* case, 238 F. 932, 934, the Court said:

"It may well be that instances may arise when inconvenience may result from bringing the action where neither party resides and where the cause of action did not arise; but questions of convenience or of the work which shall be allotted to the various districts of the United States are, within Constitutional limitations, entirely questions for the legislative branch."

In *Norris v. Ill. Central Railroad Co.*, *supra*, the Court said, denying the defendant's contention:

"The defendant here asks that the court construe that authority (to sue under the Federal Employers' Liability Act in a district where the railroad is doing business) as though the Act provided that such action might be commenced in such a district, provided, that it did not impose an unreasonable burden upon interstate commerce. In other words it asks that the Court inject something into the Act which it does not contain."

To the same effect as the foregoing cases is also *Radcliffe vs. B. & O. R. R. Co.*, 7th Circuit, *supra*, where the Court quotes approvingly from *Southern R. Co. v. Cochran*, *supra*.

See also *Wood v. D. & H. Railway*, 63 Fed. (2d), 235, where the Court distinguishes a Federal Employers' Liability Act case in a Federal Court from the *Davis v. Farmers Co-operative Co.* case, *supra*, and the case of *Michigan Central R. R. Co. v. Mix*, *supra*, pointing out that such cases are "not relevant here."

VII. THE OHIO COURT HAD NO JURISDICTION ONCE THE DISTRICT COURT JURISDICTION ATTACHED.

The provisions of the second sentence of section 6, with reference to concurrent jurisdiction, were clearly not intended to limit the provisions of the first sentence, but were added for another and a very definite reason. The Supreme Court of Connecticut had held that a cause of action under the Federal Employers' Liability Act could not be prosecuted in a state court (*Hoxie vs. N. Y., N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754). Despite the feeling that such a ruling was wrong, it was thought well, however, to remove any possible doubt by providing that state courts should have concurrent jurisdiction with the United States courts.

The demurrer filed in the instant case raised also the question as to whether the Ohio State Court had jurisdiction of the subject of the action. (R. p. 7.)

The respondent's action in the District Court was filed before the petitioner's instant suit. (R. 2.) The jurisdiction of the District Court is admitted. Section 6 of the Federal Employers' Liability Act declares the concurrent jurisdiction of both state and federal courts. We submit that the Ohio State Court was further without power to enjoin the respondent from prosecuting his action already begun in the Federal Court because the jurisdiction of the District Court had already attached and therefore the Ohio Court had no jurisdiction of the subject matter of the action.

In *Missouri, etc. v. Taylor*, *supra*, this Court held that the right of a plaintiff to choose the venue in which to file

his cause of action is a substantive right which cannot be abridged. And in the same case this Court said:

> "The grant of concurrent jurisdiction implies that in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961."

The rule is also stated as follows:

> "Where state and federal courts have concurrent jurisdiction over a particular cause, plaintiff is entitled to elect his forum, and a grant of concurrent jurisdiction to such courts implies that in the first instance plaintiff shall have the choice of the court, and incidentally whatever remedial advantage inheres therein. This right is a valuable one and may not arbitrarily be denied." (21 *Corpus Juris Secundum*, p. 807, §527.)

The following language is from *Sharon v. Terry*, 36 F. 337, 355:

> "*The jurisdiction of the Federal Court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated or impaired by any proceeding in a court of another jurisdiction.* (Italics ours.) This doctrine we hold to be uncontrovertible. It is essential to an orderly and decent administration of justice and to prevent an unseemly conflict of authority which could ultimately be determined only by superiority of physical force on one side or the other."

In *Wallace v. McConnell*, 13 Pet. (38 U. S.) 138, 151, 10 L. Ed. 95, it was said:

> "The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, *that right could not be arrested or taken away by any proceedings in another Court.* This would produce a collision in the jurisdiction of Courts that would extremely embarrass the administration of justice." (Italics ours.)

See also *Terral v. Burke Construction Co.*, 257 U. S. 532, 42 S. Ct. 188, 66 L. Ed. 352; *Herron v. So. Pac. Co.*, 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857 and *Pennsylvania Casualty Co. v. Pennsylvania*, 294 U. S. 189, 197, 55 S. Ct. 386, 79 L. Ed. 850, in which latter case the Court said:

> "The jurisdiction conferred on the District Courts by the Constitution and laws of the United States can not be affected by state legislation."

In 14 *R. C. L.*, p. 419, Sect. 122, it is said:

> "It is a general rule that *a state court has no power to enjoin parties to an action in a federal court from further prosecuting that action* where it appears that the federal court first acquired jurisdiction of the cause." (Italics ours.)

The foregoing proposition of law was announced also in *Riggs v. Johnson County*, 6 Wall. (73 U. S.) 166; 18 L. Ed. 768; *Moran v. Sturges*, 154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981, and *Central National Bank v. Stevens*, 169 U. S. 432, 18 S. Ct. 403, 42 L. Ed. 807.

The petitioner seeks to avoid the impact of the foregoing principles by asserting that it does not seek to interfere with or impair the jurisdiction of the District Court. The case of *Steelman v. All Continent Co.*, 301 U. S. 278, is cited in support of its contention that the relief sought by petitioner would not interfere with the jurisdiction of the District Court.

The *Steelman* case involved the power of a court of bankruptcy to enjoin the prosecution of a suit in another federal court upon the ground that the suit, if pressed to a decree, would thwart an inquiry into frauds charged against the bankrupts, or make relief against them difficult. The Court pointed to the provisions of the Judicial Code, and to the Bankruptcy Act, enforcing the authority given by the Judicial Code. Such act invests courts of bankruptcy with jurisdiction at law and in equity to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of the act. The Court,

referring to these statutes, points out that the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a court of bankruptcy. The situation in the *Steelman* case is entirely different from that in the case at bar and cannot, in any sense, be construed to warrant injunctive relief against the exercise of a substantive right granted by valid legislative act of Congress. To grant such injunctive relief would destroy and impair to all intents and purposes the admitted mandatory jurisdiction of a federal court with similar jurisdiction, which, in point of fact in the *Steelman* case, the Court regarded as so important as to warrant injunctive relief against action by the individual which would interfere with such jurisdiction.

The Court said in the *Steelman* case:

> "The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a court of bankruptcy. * * * Jurisdiction to administer the estate draws to itself when once it has attached, an incidental ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery."

In *Bryant v. A. C. L. R. Co., supra*, in order to sustain its position the Circuit Court, actually regarded the sought after injunction against the Company as an injunction against the proceedings of the state Court for it based its denial of such injunction upon the ground that to grant it would violate Section 265 of the Judicial Code.

The petitioner's prayer in the instant case was for an injunction to restrain the respondent from prosecuting his action in the District Court he chose and from commencing and prosecuting any other action in that court. In effect such an injunction, if granted, would of necessity impair, frustrate and interfere with the jurisdiction of the District Court which had already assumed jurisdiction under a valid

federal regulation within that orbit of constitutional power in which the Congress is supreme. Such an injunction would be an injunction against the Court in which the respondent's suit was instituted by him. See *Peck vs. Jenness*, 7 How., 48 U. S. 612, 625, 12 L. Ed. 841; *Hill vs. Martin*, 296 U. S. 393, 403, 56 S. Ct. 278, 80 L. Ed. 293; *Oklahoma Packing Co. vs. Oklahoma Gas & E. Co.*, 309 U. S. 4, 9, 60 S. Ct. 215, 80 L. Ed. 537, in which case, this Court, finding the decision of the *Stedman* case, *supra*, "plainly inapplicable," at page 9, says:

> "that the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial."

Since the respondent did not seek an injunction from the District Court to restrain the petitioner from further proceeding with the instant suit, the situation presented by the *Bryant*, *Schendel* and *Painter* cases *supra*, is not here presented. The *Bryant* case is directly in conflict with the doctrine of the *Schendel* and *Painter* decisions. We do not enter into any extended discussion of the relative merits of the conflicting decisions, save as such authorities referred to throw light upon the inquiry as to whether a state court has jurisdiction of the subject matter of the action.

Thus in *Kline v. Burke Construction Co.*, 260 U. S. 226, 228, 229, 43 S. Ct. 79, 67 L. Ed. 226, the Court points out that Section 265, Judicial Code, invoked by the Court in the *Bryant* case, *supra*, is to be construed in connection with Section 262, authorizing the U. S. courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law," and the court says that "where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court."

To the same effect are *Continental Illinois National Bank and Trust Co. v. Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110; *Looney v. Eastern Texas R. Co.*, 247 U. S. 214, 62 L. Ed. 1084, 38 S. Ct. 460; *Hull v. Burr*, 234 U. S. 712, 34 S. Ct. 892, 58 L. Ed. 1557; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205 and cases therein cited. See also *Essanay Film Co. v. Kane*, 258 U. S. 358, 361, 42 S. Ct. 318, 66 L. Ed. 658, where the Court points out:

> "in order to maintain the jurisdiction of a federal court properly invoked, and render its judgments and decrees effectual proceedings in a state court which would defeat or impair such jurisdiction may be enjoined. * * * The effect of this, as will be observed, is but to enforce the same freedom from interference, on the one hand, that it is the prime object of § 265 to require on the other."

In the *Painter* case, *supra*, the following syllabus is pertinent:

> (1) In determining whether state court injunction purporting to enjoin prosecution of federal court action brought under the Federal Employers' Liability Act by administratrix for the death of decedent, was of limited *in personam* character or was an injunction against the federal court, the realistic effect of the injunction process was required to be considered.
>
> (2) Where federal court action for death of decedent was brought under the Federal Employers' Liability Act an injunction issued by Tennessee state court on *ex parte* application of railroad company which purported to enjoin prosecution of the federal court action or prosecution of any action in any court except courts sitting in certain cities, was not construable as being merely an injunction *in personam* against the administratrix, but constituted an injunction against the federal court.
>
> (4) The state and federal system of concurrent jurisdiction requires courts of concurrent jurisdiction

to be left free to decide such *in personam* actions for money judgments as may be before them.

(6) A state court does not have such broad concurrent jurisdiction with federal court that it may decide whether the federal court is properly proceeding with a case which is within its legal jurisdiction.

(7) Neither state nor federal court has jurisdiction to enjoin the other except when one interferes with the province of the other and then the court interfered with has exclusive jurisdiction to prevent the interference.

(8) Where federal court action was brought under the Federal Employers' Liability Act a state court having concurrent jurisdiction might proceed with an action to adjudicate upon the merits as an "action *in personam* for a money judgment" but an action for injunction to restrain the federal court action would not be an action of such nature and would not be within the power of a state court.

The *Painter* case, at page 102, points out that:

"a realistic construction should be given to injunction issued by courts of a state. The effect of the Tennessee injunction is to oust the federal District Court of its jurisdiction over the case pending for damages as really as the injunction issued pursuant to the supplemental bill ousts the jurisdiction of the Tennessee chancery court."

On page 106, the Court in the *Painter* case says:

"The compelling ground of decision there (the *Schendel* case *supra*) was the necessity that federal courts be free to decide cases within their jurisdiction without interference from state courts.

We think that the nature of the dual system compels the conclusion that a state court which assumes to enjoin such an action in a federal court does so in excess of its jurisdiction and renders a decree which is void insofar as it affects proceedings in the federal court."

We submit that any injunction issued by an Ohio state court under the circumstances obtaining in this case, would amount to an impairment of the District Court's jurisdiction. Such jurisdiction having attached properly and completely, no state court has jurisdiction of the subject matter, such as to warrant it to do anything to frustrate such duty of the District Court to hear and finally determine the controversy before it.

To say that the respondent may still pursue his action in the District Court but leave himself subject to contempt proceedings and to say that such a situation does not amount to an interference with the District Court is to indulge in mere sophistry. The state court interference ought not to be direct or indirect. In the instant case the recurrent temporary injunctions issued pending decision by higher tribunals have had the effect of preventing the District Court from exercising its jurisdiction. To expose a citizen of the United States to punishment because he seeks to invoke a law of the United States is certainly to deny that the Constitution and the laws made thereunder are the supreme law of the land and are as much the law of the State as are the State enactments. *C. M. & St. P. v. Schendel* 292 Fed. 326; Art. VI, Clause 2, Constitution of the United States.

See also *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 255, 25 S. Ct. 251, 257, 49 L. Ed. 462 where the Court says:

> "The exercise by the Circuit Courts of the United States of the jurisdiction thus conferred upon them is pursuant to the supreme law of the land and will not in any proper sense entrench upon the dignity, authority or autonomy of the states for each state by accepting the Constitution has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them."

The answer, of course, is that no citizen of the United States can be exposed to punishment by a state because he

exercises a right bestowed upon him expressly, unambiguously and intentionally by the Congress, acting within that realm of power which belongs exclusively to it.

CONCLUSION.

To sustain petitioner's contention would be tantamount to:

> "taking a privilege from one upon whom it is conferred by statute, and giving it to the opposite party against whom that specific privilege was granted." *C. & O. v. Vigor*, 17 Fed. Supp. 602.

Were the petitioner's contentions to be allowed we should have a situation so chaotic as to tear down and nullify the structure of the Federal Employers' Liability Act so clearly intended to be constructed in the interest of the employee. Uncertainty and disadvantage would replace definiteness and benefit to the employee inherent in any authorized jurisdiction. That which the Congress intended to be a substantive right reposed in the employee would be distorted into a boomerang which would strip him of any worthwhile power to exercise the right intended to be granted to him, and render him instead subject to the convenience of the employer and the fancies and predilections, perhaps, of varying concepts of different courts of equity. In each instance in which the employee, under such circumstances, undertook to sue his employer in a court not to the employer's liking, the employee would face the dreary prospect of two suits with all the attendant expense and delay incidental thereto. Instead of a prompt disposition of the claims of the employee or his dependents in case of his death, there would be delay and almost insurmountable obstacles. Delay operates to the advantage of the defendant. The net result would be to mutilate Section 6, distort the purpose of the Act and deprive a citizen of the United States of a privilege specially intended for him and vest it indeed in the very defendant company against whom the privilege was intended to be lodged.

The contentions urged by the petitioner are patently unsound. Congressional power over interstate commerce is exclusive and plenary. No state court can destroy the valid exercise of this legislative power. The very statement of the petitioner's claim rebels against its acceptance.

Were the respondent's specific, express, clear and validly created federal right made subject to regulation by different courts of equity in the several states it would soon become in the picturesque language attributed to Abraham Lincoln "as thin as the homeopathic soup made by boiling the shadow of a pigeon that had starved to death."

The fact is that the respondent's right to invoke the choice of a District Court within the provisions of Section 6 is an absolute substantive federal right which no state court and no state may frustrate, deny or thwart.

We, therefore, most respectfully submit that the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

EDWARD M. BALLARD,
GEORGE METZGER,
SAMUEL T. GAINES,
Counsel for Respondent.

BORDEN & GAINES,
EDWARD M. BALLARD,
Attorneys for Respondent.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

CIVIL ACTION No. 21-M.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
a corporation,
Plaintiff,

vs.

JESSE C. CLEM AND HENRY GASSAWAY SHORES,
Defendants.

HARRY H. BYRER, ESQ., of
Baltimore, Maryland,

J. O. HENSON, ESQ., and

STEPHEN AILES, ESQ.,
Martinsburg, West Virginia,
Attorneys for Plaintiff.

H. G. SHORES, ESQ., of
Keyser, West Virginia, and

WAYLAND K. SULLIVAN, ESQ., of
Cleveland, Ohio,
Attorneys for Defendants.

MEMORANDUM OF OPINION.

BAKER, *District Judge*.

STATEMENT OF CASE AND FINDINGS OF FACT.

The plaintiff is a corporation, incorporated under the laws of the State of Maryland, with its principal place of business at Baltimore. The defendants are both citizens and residents of Keyser, Mineral County, Northern Dis-

trict of West Virginia. The plaintiff is engaged in both interstate and intrastate commerce in Maryland, West Virginia, Ohio, and several other states.

In October of 1939 the defendant, Clem, met with an accident while working as an employee of the plaintiff in its shops at Keyser, West Virginia. In October, 1940, he instituted an action, under the Federal Employers' Liability Act, in the United States District Court for the Northern District of Ohio, at Cleveland, claiming damages in the sum of $30,000.00 as a result of the aforesaid injury. He employed, among others, the defendant, Shores, as one of his counsel.

This action was brought, seeking to restrain the defendants from prosecuting the action in Cleveland upon the grounds that the same was instituted for the purpose of annoying, harassing, and vexing the plaintiff herein, and that the forum chosen, to-wit, the United States District Court in Cleveland, was selected because of its distance from the scene of the accident and because its dockets are more congested than those of this Court, and that these two facts would make the defense of the action more difficult, more expensive, and less convenient than such defense would be in a forum near the scene of the accident, and that all of this constitutes an harassment of the plaintiff and an undue and unjust burden upon interstate commerce.

There was filed with the Bill of Complaint a written motion for a preliminary injunction. Service of process, as well as of a copy of the motion for preliminary injunction, and of a notice that a motion would be made in open court at Martinsburg on November 8, 1940, for such injunction, was duly had upon both defendants. Upon November 8th, counsel for the Railroad Company filed with the Court a letter from Mr. Shores, in which he advised that neither defendant was able to be present upon November 8th, and in which he stated that the defendants had no objection to the entry of a temporary restraining order. Ac-

cordingly, a temporary restraining order was entered, restraining the defendants as prayed in the Bill of Complaint. At the same time the motion for a temporary injunction was set down for hearing at Wheeling on November 15th.

Upon the latter day, Mr. Shores appeared in person, and Mr. Clem by counsel, and both plaintiff and defendant advised the Court that they wished to file written briefs upon the legal questions involved, and both parties agreed that the temporary restraining order should continue in force until the further order of the Court.

At the hearing in Wheeling, the plaintiff introduced testimony to substantiate the allegations of the Bill of Complaint. By this testimony it was established that all of the eye-witnesses to the accident reside in the near vicinity of Keyser, West Virginia; that certain of the records, which may reasonably be presumed will be necessary for the defense of this case, are kept at either Keyser or Baltimore; that physicians, who may reasonably be presumed to be necessary witnesses in the defense thereof, reside at Keyser, Cumberland, Maryland, and Baltimore. It was further established that the Circuit Court of Mineral County, West Virginia, holds regular terms at Keyser; that this Court holds regular terms at Martinsburg, a distance of approximately 100 miles from Keyser; that the District Court of the United States for the District of Maryland holds regular terms at Cumberland, a distance of approximately 30 miles from Keyser; that Cleveland is approximately 350 miles from Keyser.

There was testimony tending to show that the dockets of the United States District Court at Cleveland are relatively more congested than the dockets of this Court at Martinsburg.

There was testimony that to defend this case at Martinsburg would probably cost the defendants, for witness fees, in the neighborhood of $326.58 and that to defend the same in Cleveland the probable attendance of the same witnesses would involve a cost of approximately $2,254.39.

Both of these figures were, of course, estimates. But from all the evidence, the Court finds as a fact that it is reasonable to presume that the cost of defending this action at Cleveland would exceed the cost of defending the same at Martinsburg by $1900.00, and that it could be defended in either the United States District Court at Cumberland, or in the Circuit Court of Mineral County at Keyser, for a still lower amount than it could at Martinsburg.

At the conclusion of the taking of testimony, the defendants dictated into the record a motion which is, in effect, a motion to dismiss this action. That motion, and the motion for temporary injunction, are now before the Court and, insofar as any of the above may be pertinent to the decision upon these motions, the Court now finds the same to be established as facts.

Conclusions of Law.

It is so well-established as to scarcely need citation of authorities that Courts of Equity have inherent jurisdiction to restrain the prosecution of actions at law where such prosecution would result in an unfair advantage to the party seeking to maintain the same. See *Story's Equity Jurisprudence* (13th Ed.), Sec. 885; 5 *Pom. Eq.*, Section 670; *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538. The question presented here is whether the facts justify an application of that equitable doctrine, especially in view of the venue section of the Federal Employers' Liability Act.

As originally passed in 1908, the Federal Employers' Liability Act, 45 U. S. C. A. 56, reads as follows:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

As thus drawn, the Federal Courts held that actions brought thereunder could be maintained only in the State in which the defendant was incorporated. This made it necessary

for plaintiffs, in many instances, to either abandon claims or to maintain actions in Courts hundreds of miles from the scene of the accident and the residence of witnesses. To cure this situation, upon April 5, 1910, the Statute was amended to read as follows:

> "*Actions; Limitations; Concurrent Jurisdiction of Courts; Removal of Case in State Court.* No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.
>
> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, *or in which the defendant shall be doing business at the time of commencing such action.* The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

It has been argued upon behalf of the plaintiff, that this section was intended merely to confer a possible venue and that there is nothing contained therein, or contained elsewhere in the Act, which deprives the Court of Equity of its ancient power to restrain vexatious actions. This Court heretofore came to the conclusion that this position was correct, and so held in a prior case. *Baltimore & Ohio Railroad vs. Bole*, 31 Federal Supplement 221. However, at the time of the decision in the *Bole* case, the Court's attention was not directed to the decision of the District Court for the Southern District of Ohio, in the case of *Chesapeake & Ohio Railway Company vs. Vigor*, 17 F. Sup. 662, nor to that of the Circuit Court of Appeals for the Sixth Circuit, affirming the same. See *Chesapeake & Ohio Railway Co. vs. Vigor*, 90 F. (2) 7.

No case from the Fourth Circuit Court of Appeals, nor any opinion by the Supreme Court of the United States,

touching upon this precise question, has been presented for the Court's consideration, and knowing the ability and diligence of counsel, I feel safe in assuming that none exist. On the other hand, the *Vigor* case, above cited, appears to me to be directly in point. The facts and holding in that case are adequately summarized in the syllabus to the District Court decision, which reads as follows:

> "Railroad held not entitled to injunctive relief, to restrain prosecution in district other than that in which accident occurred, of action for employee's death, notwithstanding objections of difficulty or inability of producing witnesses or records, added expense, disadvantage, and inconvenience to railroad, difficulty of applying law, and objection that action sought to be enjoined would burden interstate commerce, where action was brought in district in which railroad was doing business (Federal Employers' Liability Act, Par. 6, as amended 45 U. S. C. A. Par. 56)."

This decision was, as above noted, sustained by the Circuit Court of Appeals for the Sixth Circuit, and Certiorari was denied by the Supreme Court of the United States. See 302 U. S. 705.

Under these circumstances, I feel that I must follow the decision in the *Vigor* case, and applying that decision to the facts before me, must refuse a temporary injunction, must dissolve the temporary restraining order, heretofore issued, and must dismiss the present action.

Much stress was laid, in the briefs for the plaintiff, upon the decision of the Circuit Court of Appeals for the Seventh Circuit, in *Ex Parte Crandall*, 53 Fed. (2) 969. It is true that the opinion in that case contains a great deal of dicta which would seem to substantiate the Railroad Company's position. A study of that case, however, reveals that the question for decision was radically different from the one now before this Court. In that case a railroad employee was killed in an accident in Tennessee. His widow qualified as Administratrix of her husband's estate

in Vanderburgh County, Indiana, and then instituted action for damages resulting from his death in the State Court in St. Louis, Missouri. It should be noted immediately that the action for death was instituted in a State Court, not in a United States Court. Upon application by the Railroad Company, the State Court in Indiana restrained the prosecution of the Missouri State Court action. The plaintiff ignored the Court's restraining order and proceeded with the Missouri prosecution. The Indiana Court thereupon adjudged the plaintiff in contempt, assessed a fine, and ordered her confined in jail for three months, the imprisonment to be suspended upon dismissal of the St. Louis action. The case reached the Federal Court upon an application for habeas corpus, testing the legality of her confinement. This application was refused. It is true that in the opinion the Federal Court held that the State Court of Indiana was acting within its lawful jurisdiction when it enjoined the Administratrix from prosecuting the Missouri action, but it is apparent, from a mere statement of the facts, that many principles were involved in the *Craudall* case which are not before us here. In addition, the Court specifically stated in its opinion

> "Whether the power of the State Court to restrain would extend to the commencement of such suits *in any Federal Court* is not here involved."

I have commented at length upon the *Craudall* case principally because of the emphasis placed upon it by plaintiff's counsel. As to the other cases cited, suffice it to say that none involve the precise question as the case at bar. At the very best, all present merely analogous situations. The *Vigor* case is the only one directly in point, which has come to my attention.

As stated above, I feel that I must follow its decision.

W. E. Baker (signed)
U. S. District Judge.

January 15, 1941.

Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

PETITION FOR REHEARING

MORISON R. WAITE,
HARRY H. BYRER,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio,
Attorneys for Petitioner.

THE JOHNSON & HARMON CO., LAW PRINTERS
CINCINNATI, OHIO

Supreme Court of the United States

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

PETITION FOR REHEARING

Now comes the above-named Petitioner, The Baltimore and Ohio Railroad Company, and respectfully presents this, its petition for rehearing of the above-entitled cause, so that the questions involved herein may be finally decided by a majority of the court for the benefit of all litigants in causes similar to the case at bar. Both railroad employes and railroad employers would be benefited by such a decision of this court, which will prevent continuing litigation seeking the benefit of the opinion of a majority of the justices of this court.

The petitioner prays not only for a rehearing but that such rehearing may be deferred until the court is constituted with nine members.

The petitioner respectfully shows that the Supreme Court of Ohio in its decision below, 137 O. S. 409 (R., p. 23), decided that the equities favored the petitioner; that the prosecution in the District Court of the United States for the Eastern District of New York would cause great inconvenience and unnecessary expense to the railroad company, and that the Ohio courts were only prevented from following the rule declared in *New York, Chicago & St. Louis Ry. Co.* v. *Matzinger*, 136 O. S. 271, and enjoining the respondent from the prosecution of his action in an inequitable manner, by the supposed terms of section 6 of the Federal Employers' Liability Act, as amended in 1910.

It is again urged that an affirmance of the judgment of the Supreme Court of Ohio gives a construction to the act of Congress which is beyond anything expressed in the language of said act, and contrary to the manifest intention of Congress in its enactment, as shown by its history, to minimize the expense of litigation under said Federal Employers' Liability Act. This court has held that notwithstanding the broad provisions of said section 6 of the Federal Employers' Liability Act, the courts should prevent the abuse of the choice of venue afforded by the act, when such choice results in a burden upon interstate commerce. *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492. The power of State courts to enjoin an inequitable prosecution by a resident of that state in a foreign jurisdiction has long been recognized even against a right asserted under the Constitution of the United States to resort to such foreign jurisdiction. *Cole* v. *Cunningham*, 133 U. S. 107. Section 6 of the Federal Employers' Liability Act, as amended in 1910, did not either expressly or by implication, curtail the power of courts of equity to prevent an inequi-

table choice of venue. The manifest purpose of Congress as shown by the report of the Interstate Commerce Committee of the Senate in submitting the amendment to Congress, was to prevent the necessity of plaintiffs bringing actions under the act at the domicile of the defendant railroad company many miles distant from the residence of the plaintiff and the scene of the accident. It can not be presumed that in freeing the plaintiffs from such hardship, Congress gave to plaintiffs the right to impose greater hardship on the defendants, free from the restraint customarily exercised by courts of equity to prevent the prosecution of inequitable and harrassing actions.

Congress must have realized that the broad venue provisions of the act contended for on behalf of respondent, might result in inequitable use of such provisions, and designedly so worded the act as to leave the courts unfettered to prevent by injunction such inequitable actions. The inherent right of Ohio to prevent its citizens from inequitable conduct, not being expressly denied by the act, it must be strictly construed against the denial of such right by implication. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Kelly* v. *Washington*, 302 U. S. 1.

The considerations which moved this court to prevent the prosecution of cases against interstate carriers in distant jurisdictions where neither party was domiciled, remote from the place where the cause of action arose, in *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, and *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492, are much greater now than then, when the whole country is involved in a tremendous defense program, the success of which is largely dependent upon the ability of the interstate carriers to transport not only goods and persons in normal conduct of business, but also the greatly increased amount of goods and passengers due to the defense program. It is difficult to conceive of a case involving a burden on interstate com-

merce greater than that resulting in this case, where a number of railroad employes would be required to be transported and held probably many days before the call of the case for trial, in a jurisdiction the farthest distant that could be found from the residence of the respondent and the scene of the accident on petitioner's line of railroad. The utter futility of this burden and harassment is settled by the Record in the allegation in the petition, admitted by the demurrer, "that such unreasonable and inequitable proceeding will result in no benefit to the defendant, Frederick S. Kepner" (R., p. 4, paragraph No. 12 of the petition below).

This litigation has proceeded without delay on the part of this petitioner; each appeal has been perfected forthwith. The only delay was not due to petitioner but incident to a three to three decision of the Supreme Court of Ohio, which court granted a rehearing after the seventh judge had been appointed, which hearing was held the first day of the term following the summer vacation of the court.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that such rehearing be had after the court is constituted with nine members, and that the judgment of the Supreme Court of Ohio be, upon further consideration, reversed.

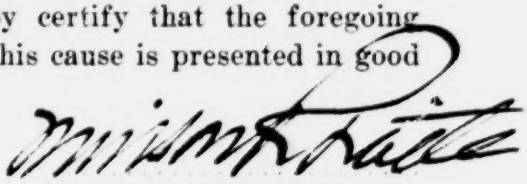
Respectfully submitted,

Morison R. Waite,
Harry H. Byrer,
William A. Eggers,
Philip J. Schneider,
Counsel for Petitioner.

Waite, Schindel & Bayless,
Cincinnati, Ohio,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I, Morison R. Waite, one of the Counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.



MORISON R. WAITE,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 678.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs.

FREDERICK S. KEPNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

SAMUEL T. GAINES,
EDWARD M. BALLARD,
GEORGE METZGER,
Counsel for Respondent.

BORDEN AND GAINES,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND OHIO

Cases Cited.

Chicot County vs. Sherwood, 148 U. S. 529, 534, 13 S. Ct. 695, 37 L. Ed. 546 ..... 2, 3

Cohens vs. Virginia, 6 Wheat. (19 U. S.) 264, 404 2

McClelland vs. Garland, 217 U. S. 268, 281-282, 30 S. Ct. 269, 54 L. Ed. 762 3

Michigan Central R. R. vs. Mix, 278 U. S. 492 3

Missouri ex rel. St. Louis B. & M. Ry. Co. vs. Taylor, 266 U. S. 200, 208, 209, 69 L. Ed. 247, 45 S. Ct. Rpr. 47 2

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Willcox vs. Consolidated Gas Co., 212 U. S. 19, 40, 29 S. Ct. 192, 53 L. Ed. 382 ..... 2, 3

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

The respondent opposes the petition for rehearing. For some eighteen months the respondent has been prevented, by the instant litigation, from having his cause of action heard on its merits in the Court in which his suit is pending. He was injured May 19th, 1939. The statute of limitations at the time his cause of action accrued was two years.

During argument on the merits, counsel for the petitioner mentioned for the first time, *Robertson vs. Railway Labor Board*, 268 U. S. 619. It may not be amiss, therefore, to state that such case is definitely not in point and that it is readily to be distinguished from the instant case. In the *Robertson* case, this Court at page 622 said:

> "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has power likewise to provide that process of every district court shall run into every part of the United States."

This Court, addressing itself to the query as to whether Congress had done so in the statute there under consideration concluded that it had not. The Court pointed out that

the proceeding there invoked was "*in personam* as distinguished from venue" (page 622), that the frequent use of the words "any Court" has been interpreted "under similar circumstances as meaning any court of competent jurisdiction" (page 627) that the Board's functions were "purely advisory" and that it entered the district court "not to enforce a substantive right, but in an auxiliary proceeding to secure evidence from one who may be a stranger to the matter with which the Board is dealing."

In the instant case, on the other hand, the Congress clearly and admittedly conferred jurisdiction on the federal district court of the district where the defendant was doing business. Thus in unequivocal language, Congress did what was conceded in the *Robertson* case to be within its power to do. In the instant case, too, unlike the Board in the *Robertson* case, the respondent was seeking to invoke a substantive right. See *Missouri ex rel. St. Louis B. & M. Ry. Co. vs. Taylor*, 266 U. S. 200, 208, 209, 69 L. Ed. 247, 45 S. Ct. Rpr. 47, where this Court said, omitting citations:

> "The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. * * * No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right."

Though the jurisdiction of the federal district court invoked by the respondent was not assailed or attacked in that Court by the petitioner, it may not be inapropos to point to the following additional authorities which support the contention that the jurisdiction of a federal court thus invoked is mandatory.

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 404;

Chicot County v. Sherwood, 148 U. S. 529, 534, 13 S. Ct. 695, 37 L. Ed. 546;

Willcox v. Consolidated Gas Co., 212 U. S. 19, 40, 29 S. Ct. 192, 53 L. Ed. 382;

McClelland v. Garland, 217 U. S. 268, 281-282, 30 S. Ct. 269, 54 L. Ed. 762;

Smith v. Apple, 264 U. S. 274, 280, 44 S. Ct. 311, 68 L. Ed. 678.

In the *Willcox* case, *supra*, the syllabus reads:

> "It is not a question of discretion or comity for the Federal Court to take jurisdiction of a case. It is the duty of that court to take jurisdiction when properly appealed to. * * *"

On page 40, the Court said:

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction it is its duty to take such jurisdiction." * * *

The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied.

In the *Chicot County* case, *supra*, at page 534, this Court said:

> "But the Courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. * * * This principle has been steadily adhered to by this Court."

In the petition for rehearing petitioner refers again to *Michigan Central R. R. vs. Mix*, 278 U. S. 492. That case, it may again be stated, is not in point. In the *Mix* case, the action enjoined was filed in a state court in a state where no part of the railroad's line ran, where it had not consented to be sued and where it had never done any business except the solicitation of freight. Such facts were deemed controlling in the *Mix* case. The facts in the instant case are entirely different. Here the action is filed in a federal court in a district where the petitioner's lines run and where it admittedly is doing business within the meaning of Section 6.

The petitioner admits on page 3 of its petition that Congress, enacting Section 6, must have realized that an employee could invoke its provisions in its broadest aspects. That being true, Congressional failure to qualify or limit or allow for conflict with the exercise of such a right thus created by it, would call for the application of the principle of statutory construction that the mention of one thing implies the exclusion of another thing. "Expressio unius est exclusio alterius" or as sometimes phrased, "expressum facit cessare tacitum." A thing expressed puts an end to implication. Thus where the legislature has made no exception to the positive terms of a statute the presumption is that it intended to make none and it is not the province of a court to introduce an exception by construction.

Whatever the precipitating cause which resulted in consideration of the amendment which became Section 6, it would seem clear that Congress did enact a valid statute intended to vest jurisdiction in district courts of the United States in certain districts clearly and unambiguously set forth. The scope of the adopted statute, if within the power of Congress to enact, is not limited necessarily by the reason which led originally to the consideration eventuating in such statute.

The respondent eagerly awaits an opportunity to dispose of his cause of action on its merits. He should not longer be denied the exercise of that right vested in him, by a valid Congressional enactment. Ten Judges prior to this Court's judgment of affirmance, have passed on the instant case. Nine of these ten have upheld the respondent's position. The fact of an equal division of this Court, of itself, certainly does not warrant the granting of the instant petition. Otherwise no judgment by an equally divided Court would ever become effective. Executive delay would then operate to deny the expeditious disposition of litigation by this Court and a judgment of affirmance by an equally divided Court would become impotent. The crea-

tion of the rule contemplates its use and applicability where the circumstances call for it, with the finality and potency of any other judgment.

Respectfully submitted,

SAMUEL T. GAINES,
EDWARD M. BALLARD,
GEORGE METZGER,
Counsel for Respondent.

BORDEN & GAINES,
Attorneys for Respondent.

p. 3 dissent.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1941.

The Baltimore and Ohio Railroad Company, Petitioner, *vs.* Frederick S. Kepner. | On Writ of Certiorari to the Supreme Court of the State of Ohio.

[November 10, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

We have for decision in this case the question whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act in a federal court of another state where that Act gave venue, on the ground that the prosecution in the federal court is inequitable, vexatious and harassing to the carrier.

As the issue was deemed a federal question of substance,[1] undecided by this Court, and concerning which there was lack of uniformity in the state court decisions[2] certiorari was granted, 312 U. S. 671, the decree below affirmed here by an equally divided court, 313 U. S. 542, and the petition for rehearing allowed, 313 U. S. 597.

This proceeding originally was brought by the petitioner, an interstate railroad, in the Court of Common Pleas of Hamilton County, Ohio, against the respondent Kepner, an injured resident employee, to enjoin his continued prosecution of a suit in the United States District Court for the Eastern District of New York under the Federal Employers' Liability Act for his injuries. The accident, according to the petition, occurred in Butler County, Ohio, a county adjacent to that of respondent's residence, through both of which counties petitioner's railroad ran. The petition further showed that suitable courts, state and federal, were constantly open and that petitioner and the witnesses were available for

[1] Judicial Code, § 237b.

[2] McConnell v. Thomson, 213 Ind. 16, 8 N. E. (2d) 986; Reed's Admrx. v. Illinois Central R. Co., 182 Ky. 455, 206 S. W. 794.

process therein. It was stated the federal court chosen was seven hundred miles from the residence of the respondent and numerous witnesses; that to present the case properly required the personal attendance of approximately twenty-five locally available witnesses —the crew, inspectors and the medical attendants—at a cost estimated to exceed the cost of the presentation of the case at a convenient point by $4,000, with no resulting benefit to the injured employee. Petitioner asserted these facts established that the continued prosecution of the federal court action would be an undue burden on interstate commerce and an unreasonable, improper and inequitable burden upon petitioner itself.

The defendant railroad was doing business in the New York district where the damage suit was filed as appears from a copy of the complaint in the federal case made a part of the petition.

Respondent demurred for failure to state a cause of action and lack of jurisdiction of the subject of the action. The trial court sustained the demurrer and dismissed the action by an order which was sustained by the Court of Appeals and, on rehearing, by the Supreme Court of Ohio.[3] The basis for the decision below was that the respondent employee was privileged to enjoy, without interference from a state court, the venue allowed by the Federal Employers' Liability Act.[4]

The statutory provision in regard to venue is in Section 6 which so far as pertinent reads as follows:

Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. (Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291, as amended March 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; 45 U. S. C. Sec. 56.)

When the second Employers' Liability Act was enacted, venue of actions under it was left to the general venue statute, 35 Stat. 65, which fixed the venue of suits in the United States courts based in whole or in part upon the Act in districts of which the defendant was an inhabitant.[5] Litigation promptly disclosed what Congress considered deficiencies in such a limitation of the right of railroad

[3] 137 Ohio State 206 and 409.

[4] 137 Ohio State 409, 416.

[5] First section of the act of March 3, 1875, 18 Stat. 470, as amended by the act of March 3, 1887, 24 Stat. 552, and act of August 13, 1888, 25 Stat. 433.

employees to bring personal injury actions,[6] with the result that the present language was added.[7]

The reason for the addition was said to be the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes.[8] The legislative history throws little light on the reason for the choice of the three standards for determining venue: the residence of the carrier, the place where it is doing business, or the place where the cause of action arose. At one time the amendatory bill fixed venue as "the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of commencing such action."[9] Fears were expressed that so wide a choice might result in injustice to the carrier. p. 2257. No doubt this language was actually considered by the Senate Judiciary Committee as well as the language of the general venue statute for which the Committee was providing an exception. Specific attention was called in the Senate report to the *Macon Grocery* case, interpreting the general venue statute. That statute placed venue in the residence of either party where the jurisdiction was founded on diversity of citizenship alone. The language finally adopted must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill, "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so."[10]

When petitioner sought an injunction in the Ohio court against the further prosecution of the federal court action in New York, the petition alleged that prosecution of the New York action would entail "an undue burden" on interstate commerce. No objection to the decree below upon that explicit ground appears in the petition for certiorari either in the specification of errors or reasons for granting the writ. In petitioner's brief on the merits, it is pointed out that this Court held in *Denver & Rio Grande*

[6] Cound v. Atchison, T. & S. F. Ry., 173 Fed. 527; Macon Grocery Co. v. Atlantic C. L. R. Co., 215 U. S. 501, 506. Senate Report No. 432, 61st Cong., 2d Sess., p. 4.

[7] April 5, 1910, c. 143, 36 Stat. 291.

[8] Senate Report No. 432, 61st Cong., 2d Sess., p. 4.

[9] Congressional Record, 61st Cong., 2d Sess., Vol. 45, Part 3, p. 2253.

[10] *Id.*, Part 4, p. 4034.

Western R. Co. v. *Terte*, 284 U. S. 284, that the disadvantages of litigation far from the scene of the accident are not substantial enough to justify a state court in forbidding the continuation of the litigation in a district where the lines of the carrier run. This accords with *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21, where it was said the carrier must "submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."[11] Since the carrier's exhibit of respondent's New York petition shows an allegation that it is doing business in New York, we assume that business to be such as is contemplated by the venue provisions of Section 6. There is therefore no occasion to consider further the suggestion that the suit in New York creates an inadmissible burden upon interstate commerce.

The real contention of petitioner is that despite the admitted venue respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent's doorstep. Under such circumstances petitioner asserts power, abstractly speaking, in the Ohio court to prevent a resident under its jurisdiction from doing inequity. Such power does exist.[12] In the *Matzinger* case the Supreme Court of Ohio exercised this power to prevent the continuation of a personal injury suit in Illinois by a resident under its jurisdiction on an Ohio cause of action. Such power has occasionally been exercised by one state over its citizens seeking to enforce in other states remedies under the Employers' Liability Act against defendants, locally available for the litigation.[13] At times the injunction has been refused.[14]

[11] Cf. International Milling Co. v. Columbia Co., 292 U. S. 511, 517-21; St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200, 207. Davis v. Farmers Co-operative Co., 262 U. S. 312, is limited to its particular facts, 292 U. S. 511 at 517; Michigan Central v. Mix, 278 U. S. 492, and Atchison Ry. Co. v. Wells, 265 U. S. 101, turn on the absence or inconsequential character of business done within the states where the railroads were sued. The *Mix* case is differentiated from the *Foraker* and *Taylor* cases because the carrier's lines of contracts did not run or call for performance in the territory over which the court where the objectionable action was filed had jurisdiction.

[12] New York, C. & St. L. R. Co. v. Matzinger, 136 Ohio State 271, 25 N. E. (2d) 349; Cole v. Cunningham, 133 U. S. 107; Simon v. Southern Ry., 236 U. S. 115, 123.

[13] Kern v. Cleveland, C. C. & St. L. Ry., 204 Ind. 595, 185 N. E. 446; Reed's Admrx. v. Illinois Central R. Co., 182 Ky. 455, 206 S. W. 794; Ex parte Crandall, 53 F. (2d) 969.

[14] Missouri Kansas Texas R. Co. v. Ball, 126 Kan. 745, 271 Pac. 313; Louisville & Ohio R. Co. v. Parrent, 260 Ill. App. 284; Lancaster v. Dunn, 153 La. 95 So. 385.

We read the opinion of the Supreme Court of Ohio to express the view that if it were not for Section 6 of the Employers' Liability Act the requested injunction would be granted on the undisputed facts of the petition. Section 6 establishes venue for an action in the federal courts. As such venue is a privilege created by federal statute[15] and claimed by respondent the Supreme Court of Ohio felt constrained by the Supremacy Clause to treat Section 6 as decisive of the issue. It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 72.[16] Its correct decision depends upon a construction of a federal act.[17] Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.[18]

Petitioner presses upon us the argument that the action of Congress gave an injured railway employee the privilege of extended venue, subject to the usual powers of the state to enjoin what in the judgment of the state courts would be considered an improper use of that privilege. This results, says petitioner, because the Act does not in terms exclude this state power.[19] As courts of equity admittedly possessed this power before the enactment of Section 6, the argument continues, it is not to be lightly inferred that the venue privilege was in disregard of this policy. But the federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience.[20] There is no occasion to distinguish between the power and the propriety of its exercise in this instance since the limits of the two are here co-extensive. The privilege was granted because the general venue provisions worked injustices to employees. It is

[15] Neirbo Co. v. Bethlehem Corp., 308 U. S. 165.

[16] A contrary view as to injunctions against actions in state courts has been expressed. Roberts: Federal Liabilities of Carriers (2d Ed.) Vol. 2, § 962.

[17] Cohens v. Virginia, 6 Wheat. 264, 379.

[18] Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, 505; Tullock v. Mulvane, 184 U. S. 497, 505, 512-13; Cincinnati, New Orleans & Texas Pac. Ry. v. Rankin, 241 U. S. 319, 326-27; Chesapeake & Ohio Ry. v. Martin, 283 U. S. 209, 213; Chesapeake & Ohio Ry. v. Kuhn, 284 U. S. 44, 47; Federal Land Bank v. Priddy, 295 U. S. 229, 231; cf. Roberts, *op cit., supra.*

[19] Federal Trade Commission v. Bunte Bros., 312 U. S. 349; United States v. Darby, 312 U. S. 100; Hines v. Davidowitz, 312 U. S. 52; Kelly v. Washington, 302 U. S. 1.

[20] Chesapeake & Ohio Ry. v. Vigor, 90 F. (2d) 7; Baltimore & Ohio R. Co. v. Clem, 36 F. Supp. 703, overruling Baltimore & Ohio R. Co. v. Bole, 31 F. Supp. 221.

obvious that no state statute could vary the venue[21] and we think equally true that no state court may interfere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harassment. When the section was enacted it filled the entire field of venue in federal courts.[22] A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910, for the benefit of employees. This Court held in *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21, that the burden on interstate commerce would be disregarded where the carrier had lines in the distant state. The importance of unhampered commerce is at least as great as that of a carrier's freedom from harassing incidents of litigation. Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York.[23]

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[21] It was held in Chicago, M. & St. P. Ry. *v.* Schendel, 292 Fed. 329, 327-32, that by virtue of the Supremacy Clause a state statute was unconstitutional which forbade the doing of any act to further litigation in another state, by testimony or otherwise, on a personal injury claim arising locally.

[22] Cf. New York Central R. Co. *v.* Winfield, 244 U. S. 147, 151.

[23] We do not think petitioner's attempted distinction between a prohibited injunction directed at the court and a permitted one directed at the parties is valid. An order to the parties forbidding prosecution would destroy venue effectually. Oklahoma Packing Co. *v.* Gas Co., 309 U. S. 4, 9. Cf. Hill *v.* Martin, 296 U. S. 393, 403. Steelman *v.* All Continent Corp., 301 U. S. 278, relied upon by petitioner would be pertinent only if there were occasion for the state court to control federal venue. It would then be exercised against the parties.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1941.

The Baltimore and Ohio Railroad Company, Petitioner, *vs.* Frederick S. Kepner. | On Writ of Certiorari to the Supreme Court of the State of Ohio.

[November 10, 1941.]

Mr. Justice Frankfurter, dissenting.

Disagreement with the views of the majority on the construction of a venue provision does not ordinarily call for expression. But inasmuch as the decision in this case unjustifiably limits long-settled powers of the state courts and thereby brings into disequilibrium the relationship of federal and state courts I think it proper to express my views.

The decision of the Court seems to be epitomized in this sentence: "A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense." As a general proposition, the suggestion that a privilege of venue granted by the legislative body which creates the right of action "cannot be frustrated for reasons of convenience or expense" would be as novel as it is untenable. To give unique scope to this venue provision different from the significance accorded all other provisions of venue "granted by the legislative body which created" the right is no less novel doctrine. For this departure from the effect customarily given to venue provisions, no warrant is avouched in the specific provisions of the Federal Employers' Liability Act, the general provisions of legislation defining the relationship between federal and state courts, the principles applied in the decisions of this Court, or settled doctrines of equity jurisdiction. None is avouched because none is available.

The opinion does not deny the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits. See *e. g.*, *Cole* v. *Cunningham*, 133 U. S. 107, 118-20; *Pere Marquette R. Co.* v. *Slutz*, 268 Mich. 388; *Mason* v. *Harlow*, 84 Kan. 277; *Wilser* v. *Wilser*, 132 Minn. 167; *Northern Pac. R. Co.* v. *Richey*, 132 Wash. 526; *O'Haire* v. *Burns*, 45 Colo. 132; *Miller* v. *Gittings*, 85 Md. 601. Nor does it question the

familiar doctrine of *forum non conveniens* under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See *Canada Malting Co.* v. *Paterson*, 285 U. S. 413, 422-23; *Massachusetts* v. *Missouri*, 308 U. S. 1, 19; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130-31. These manifestations of a civilized judicial system are firmly imbedded in our law. See Foster, *Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1. Nor does the decision give new currency to the discredited notion that there is a general lack of power in the state courts to enjoin proceedings in federal courts. Cf. *Princess Lida* v. *Thompson*, 305 U. S. 456, 466; Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345. Nothing in Article III of the Constitution or in the legislation by which Congress has vested judicial power in the federal courts justifies such a doctrine.

And so the basis of the decision of the Court must be found, if anywhere, in the terms of the venue provision of the Federal Employers' Liability Act. The section provides, simply, that an action under the Act "may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commending such action", that the jurisdiction of the federal courts shall be "concurrent" with that of the state courts, and that no action brought in a state court of competent jurisdiction shall be removed to a federal court. 36 Stat. 291; 45 U. S. C. § 56. The phrasing of the section is not unique; it follows the familiar pattern generally employed by Congress in framing venue provisions. *E. g.*, 28 U. S. C. § 112 (suits based upon diversity of citizenship); 28 U. S. C. § 53 (suits by or against China Trade Act corporations); 28 U. S. C. § 104 (suits for penalties and forfeitures); 28 U. S. C. § 105 (suits for recovery of taxes); 28 U. S. C. § 41(26)(b) (interpleader). The decision cannot rest, therefore, upon any peculiarities of the language of the provision.

Nor can justification for the Court's conclusion be found in the legislative history of the section or the clearly expressed reasons of policy underlying its enactment. As the House and Senate committee reports show, H. Rept. No. 513, pp. 6-7, S. Rept. No. 432, pp. 3-4, 61st Cong., 2d Sess., Congress was aware of the hardship by which under the original Employers' Liability Act of April 22, 1908,

35 Stat. 65, the plaintiff could bring his action only at the railroad's "residence". *Cound* v. *Atchison, Topeka & Santa Fe R. Co.*, 173 Fed. 527. The amendment of 1910 greatly enlarged the range of a plaintiff's convenience in bringing suit. It is not disputed that the amendment was intended to open to a plaintiff courts from which he previously was barred. But that is not the question before us. The problem is whether the Act was intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses, thereby not only depriving state courts of their old power to protect against unjustly oppressive foreign suits, but also forbidding federal courts to decline jurisdiction "in the interest of justice" on familiar grounds of *forum non conveniens*. See *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422-23. Nothing in the history of the 1910 amendment indicates that its framers contemplated any such vast transformation in the established relationship between federal and state courts and in the duty of the federal courts to decline jurisdiction "in the interest of justice". On the contrary, the expressed considerations of policy underlying the amendment were fundamentally the same as those underlying the equitable power to restrain oppressive suits and the reciprocal doctrine of *forum non conveniens*: It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensatingly fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties.

This doctrine of justice applies with especially compelling force where the conveniences to be balanced are not merely conveniences of conflicting private interests but where there is added the controlling factor of public interest. The so-called "convenience" of a railroad concerns the important national function of which the railroads are the agency. As in other phases of federal railroad regulation, the interests of carriers, employees, and the public must be balanced. Because of the "direct concern of the public" in maintaining an economic and efficient railroad system, a unanimous Court, speaking through Mr. Justice Brandeis, held that a carrier may not be sued by a plaintiff where, under the circumstances of the particular facts, such suit would impose an unfair

burden upon railroads and thereby upon the nation. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312. The declaration by Congress that a court has jurisdiction and venue is not a command that it must exercise its authority in such a case to the unnecessary injury of a defendant and the public. This doctrine has been consistently followed in a series of unanimous decisions. *Atchison Ry.* v. *Wells*, 265 U. S. 101; *Michigan Central* v. *Mix*, 278 U. S. 492; *Hoffman* v. *Foraker*, 274 U. S. 21; *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284.[1] Of course, Congress if it chose, could subject interstate carriers to the jurisdiction of the state courts even in the situations in which this Court found that assumption of jurisdiction would be an injustice to the public. But Congress has not expressed a different view of the governing public interest —and these cases stand as unchallenged authorities that notwithstanding the provision of the Federal Employers' Liability Act conferring unqualified "concurrent jurisdiction" upon the state courts, a plaintiff may in some circumstances be barred from bringing his suit in one of the places specified by the Act. In this respect, at least, a plaintiff's "privilege of venue granted by the legislative body which created this right of action" *can* "be frustrated for reasons of convenience or expense".

The opinion of the Court attaches importance to a phrase taken from Senator Borah's remarks on the floor of the Senate in submitting the bill to amend the Act: "The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." 45 Cong. Rec. 4034. The context of this statement is set out in the footnote.[2]

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[1] *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, did not restrict but expressly recognized the doctrine of the *Davis* case. In finding the scope of the *Davis* doctrine in the circumstances which gave rise to it, the opinion in the *Milling Co.* case only followed traditional technique in the use of precedents. It made precisely the same differentiation that Mr. Justice Brandeis, who articulated the doctrine in the *Davis* case, made in applying the principle of the case to subsequent situations. See St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200, and Hoffman v. Foraker, 274 U. S. 21. The doctrine itself stands unchallenged. The present decision does not challenge it.

[2] "Mr. President, I wish to discuss very briefly the bill. The bill as it is now pending provides for three amendments to the employers' liability law which is now upon the statute books. The first has reference to the venue . . . . The objection which has been made to the existing law, and the objection arises by reason of the decision of some of the courts, is that the plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in certain instances in the district in which the defendant is an inhabitant. In other words, the corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to

The intrinsic difficulties of language and the emergence, after enactment, of situations not anticipated by even the most gifted legislative imagination reveal the doubts and ambiguities in statutes that so often compel judicial construction. To illumine these dark places in legislative composition all the sources of light must be drawn upon. But the various aids to construction are guides of experience, not technical rules of law. See *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48. One of the sources which may be used for extracting meaning from legislation is the deliberative commentary of the legislators immediately in charge of a measure. Contemporary answers by those authorized to give answers to questions raised about the meaning of pending legislation obviously go a long way to elucidating doubtful legislative purpose. But this rule of good sense does not mean that every loose phrase even of the proponent of a measure is to be given the authority of an encyclical. The language of a chairman of a committee, like the language of all people, is merely a symbol of thought. A speaker's casual, isolated general observation should not be tortured into an expression of disregard for an established, far-reaching policy of the law. Especially in the case of Senator Borah such imputation should not be made. As is well known, he eyed most jealously the absorption of state authority by extension of federal power. It would have been easy to vest the enforcement of the Federal Employers' Liability Act entirely in the federal courts. Instead, not only was concurrent jurisdiction given to the state courts in the enforcement of this federal right but removal of a state action to the federal courts was prohibited. Instead of being deemed hostile to the purposes of the Federal Employers' Liability Act and not to be entrusted with its administration, the state courts were accepted as the most active agencies for its enforcement. And yet, although nowhere in the course of the whole legislative history of the Act in question—the hearings, the reports in both houses, the debates on the floor—is there the slightest intimation that the problem before us entered the mind of any legis-

travel a long distance in order, under certain conditions, to bring his action against the defendant and come within the terms of the law. So, if this bill should be passed the law will be remedied in that respect, in enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." 45 Cong. Rec. 4634.

lator, we are asked to attribute to Senator Borah the uprooting of a doctrine which is an old and fruitful part of the fabric of the law of the states as well as the law of the land, by a general observation which has no relation to this doctrine and to which respectful meaning can be given without such distortion.

To read the venue provision of the Act as do the majority of the Court is to translate the permission given a plaintiff to enter courts previously closed to him into a withdrawal from the state courts of power historically exercised by them, and into an absolute direction to the specified federal and state courts to take jurisdiction. The implications of such a construction extend far beyond the situation we now have here of an attempt by a state court to enjoin an action brought in a federal court sitting in another state. It seems to be generally held that the grant to the state courts of jurisdiction concurrent with the federal courts does not deprive one state court of the power to enjoin an oppressive suit under the Act in a foreign state court.[3] Moreover, this Court has expressly held that the venue provision of the Employers' Liability Act does not prevent a state court from declining jurisdiction as a *forum non conveniens*. *Douglas* v. *New Haven R. Co.*, 279 U. S. 377. To be sure, under the guise of applying local doctrines of equity jurisdiction, a state court cannot defeat the proper assertion of a federal right. Resort to this Court may always be had to lay bare such an unwarranted frustration. *American Ry. Exp. Co* v. *Levee*, 263 U. S. 19; *Davis* v. *Wechsler*, 263 U. S. 22. But such supervisory power by this Court over the determination of federal rights by state courts does not imply the denial of power in the state courts to make such determinations in the first instance. *Second Employers' Liability Cases*, 223 U. S. 1, 56-57; *Claflin* v. *Houseman*, 93 U. S. 130, 136-37; *Robb* v. *Connolly*, 111 U. S. 624, 637; cf. Warren, *Federal Criminal Laws and State Courts*, 38 Harv. L. Rev. 545, 596-97. The long history of leaving the effective enforcement of federal rights to state courts has proceeded on recognition of the power of the state courts to exercise

[3] See Reed v. Illinois Central R. Co., 182 Ky. 455; Chicago, M. & St. P. R. Co. v. McGinley, 175 Wis. 565; State ex rel. New York, C. & St. L. R. Co. v. Nortoni, 331 Mo. 764; Kern v. Cleveland, C. C. & St. L. R. Co., 204 Ind. 595, with which compare McConnell v. Thomson, 213 Ind. 16; cf. Ex parte Crandall, 53 F. (2d) 969. The lower federal courts have usually declined to enjoin suits under the Act brought in other federal courts. See Rader v. Balt. & O. R. Co., 108 F. (2d) 980, 985-86; Chesapeake & O. R. Co. v. Vigor, 90 F. (2d) 7; Southern R. Co. v. Cocnran, 56 F. (2d) 1019, 1020.

in the first instance their settled doctrines of law and equity. The opinion of the Court ignores these settled principles. In an area demanding the utmost judicial circumspection, dislocating uncertainty is thereby introduced.

If the privilege afforded a plaintiff to bring suit under the Employers' Liability Act in one place rather than in another is to be regarded as an absolute command to the federal courts to take jurisdiction regardless of any considerations of justice and fairness, why is not the same effect to be given the comparable general venue provisions of § 51 of the Judicial Code, 28 U. S. C. § 112? Nothing in the language or the history of the venue provision of the Act differentiates it from the numerous other venue provisions of the Judicial Code. Is the settled doctrine of *forum non conveniens* to be deemed impliedly repealed by every such venue provision? Surely it is much more consonant with reason and right to read venue provisions in the familiar context of established law rather than to impute to Congress an unconsidered, profound alteration in the relationship between the federal and the state courts and in the relations of the federal courts *inter se*. Cf. *Gay* v. *Ruff*, 292 U. S. 25.

The Chief Justice and Mr. Justice Roberts join in this opinion.